CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1947

No. 78

CHICAGO AND SOUTHERN AIR LINES, INC., PETITIONER,

vs.

WATERMAN STEAMSHIP CORPORATION

No. 88

CIVIL AERONAUTICS BOARD, PETITIONER,

vs.

WATERMAN STEAMSHIP CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR CERTIORARI FILED MAY 6, 1947—MAY 13, 1947.

CERTIORARI GRANTED JUNE 16, 1947.

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

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PETITION FOR REVIEW.

Filed September 6, 1946.

In the United States Circuit Court of Appeals for the Fifth Circuit.

Waterman Steamship Corporation, Merchants National Bank Building, Mobile, Alabama, Petitioner,

vs. No. .....

Civil Aeronautics Board, Department of Commerce Building, Washington, D. C., Respondent.

PETITION FOR REVIEW.

To the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now the Waterman Steamship Corporation (hereinafter referred to as the "Petitioner") and submits this its Petition for Review of the following orders and decisions of the Civil Aeronautics Board (hereinafter referred to as the "Respondent"):

1. The order of the Respondent dated May 17, 1946, Serial No. 4793, denying the application of Petitioner for a Certificate of Public Convenience and Necessity, and granting a Certificate of Public Convenience and Necessity to Chicago and Southern Air Lines, Inc. (hereinafter referred to as "C & S"). A copy of said order is attached to this Petition and made a part hereof and designated Exhibit A.

2. The decision of the Board, contained in its opinion in Docket No. 525, et al., dated May 17, 1946, *holding* that a surface carrier upon an application under Section 401 of the Civil Aeronautics Act of 1938,

as amended, c. 601 (52 Stat. 973) U. S. C., Title 49, Sec. 401-681 (hereinafter referred to as the "Act"), must meet the requirements of Section 408 (b) of the Act.

3. The order of the Respondent, dated May 17, 1946, Serial No. 4795, denying the Petitioner's motion to reopen the proceeding in Docket No. 525, et al., to receive further evidence and for reargument. A copy of said order is attached hereto and made a part hereof and designated Exhibit B.

4. The order of the Respondent, dated July 12, 1946, Serial No. 4977, denying the petition of the Petitioner for a rehearing and a reconsideration of the opinion and orders, referred to above. A copy of said order is attached hereto and made a part hereof and marked Exhibit C.

The said order of the Respondent, dated July 12, 1946, Serial No. 4977, constitutes it final order insofar as the issues raised by this Petitioner are concerned. Said orders of the Respondent are not in respect of any foreign air carrier, as defined in Section 1 (19) of the Act.

In support hereof, Petitioner respectfully shows:

1. That Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of Alabama, with its principal office and place of business in the Merchants National Bank Building, Mobile, Alabama; that it is a common carrier by water, engaged in the operation of steamships in the domestic and foreign trades of the United States.

2. That Respondent is the fully constituted authority, acting under and by virtue of the Civil Aeronautics Act of

1938, as amended, and subject to the Executive Orders, Reorganization Plan No. III, Paragraph 7, effective June 30, 1940, 5 Fed. Reg. 2109, 54 Stat. 1233; Reorganization Plan No. IV, Paragraph 7, effective June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; under the Reorganization Act of 1939, in the regulation of transportation by air and in the issuance of Certificates of Public Convenience and Necessity therefor.

3. On December 19, 1940, Waterman Airlines, Inc., a subsidiary of Petitioner, filed its verified application with Respondent, under the provisions of Section 401 of the Act, for a Certificate of Public Convenience and Necessity, authorizing it to engage in scheduled air transportation of persons, property and mail between the terminal points of New Orleans, Louisiana, and San Juan, Puerto Rico, via the intermediate point Tampa, Florida. Subsequently, on June 26, 1941 and September 27, 1943, Petitioner filed its amendments numbered 1 and 2 to its original application which, among other things, eliminated that part of its application for authority to transport mail. Thereafter, on the 9th day of February, 1944, said application was amended by substituting the name of Petitioner herein as the Applicant.

4. On October 5, 1942, C & S filed with Respondent its verified application for a Certificate of Public Convenience and Necessity, authorizing scheduled air transportation over various routes in the Caribbean and Central American areas, which application was designated as Docket No. 798. In such verified application, C & S represented itself as "fit, willing, able and ready to, and is properly equipped, organized, staffed and financed, to properly perform adequate and safe air transportation services over said routes." Thereafter on September 23, 1943, May 5, 1944 and July 9, 1944, C & S filed its Amendments num-

bered 1, 2 and 3, respectively, to its application, by which Amendments C & S applied for a Certificate of Public Convenience and Necessity, authorizing scheduled air transportation over various routes in the Caribbean, Central and South American areas, which included a route between New Orleans, Louisiana, and San Juan, Puerto Rico, via certain specified intermediate points.

5. On, or about, December 6, 1943, the Respondent, over the protest of Petitioner herein, consolidated for hearing under Docket No. 525, et al., all applications which had been filed for Certificates of Public Convenience and Necessity, authorizing scheduled air transportation services on all routes between the United States and Mexico, Central America, South America, and the Caribbean area.

6. That hearings on such applications were held before Examiners of Respondent from September 18 to October 13, 1944. The Report of the Examiners was served on all parties on March 5, 1945. Exceptions and briefs in support thereof were filed on March 20 and April 23, 1945, respectively, and oral arguments were heard by Respondent from April 30 to May 5, 1945.

7. Thereafter, on May 6, 1946, at which time the Respondent had not issued or denied any Certificate of Public Convenience and Necessity in this proceeding, nor had there been published any decision of the Respondent therein, or approval thereof by the President, as required in Section 801 of the Act, Petitioner filed its motion to reopen the proceeding to receive further evidence and for re-argument, which motion was denied by the Respondent by its order, Serial No. 4795, served upon Petitioner on May 24, 1946.

8. The order of the Respondent, Serial No. 4793, and the opinion of the Respondent attached thereto, were served

upon Petitioner on May 24, 1946. Thereafter, within the period prescribed by the regulations of the Respondent, Petitioner filed its Petition for Rehearing and Reconsideration, which said Petition was, by the Respondent's order, Serial No. 4977, denied on July 12, 1946, such order constituting the final order of Respondent with respect to the matters upon which this Petition is based.

9. This Court has jurisdiction to review the orders and decisions of the Respondent referred to herein, and under the Civil Aeronautics Act of June, 1938, c. 601 (52 Stat. 973), Title 49 U. S. C., Sections 401-681. The section dealing with judicial review (Section 1006, 49 U. S. C., Sec. 646) is quoted in full in Exhibit D hereof. Under the decisions of the courts, the appeal period was suspended until the Petition for Rehearing was denied. *Saginaw Broadcasting Co. v. Federal Communications Commission*, 68 App. D. C. 282, 286, 287; 96 F. (2d) 554; *Southland Industries, Inc. vs. Federal Communications Commission*, 69 App. D. C. 82, 85, 99 F. (2d) 117; *Braniff Airways, Inc. v. Civil Aeronautics Board*, 79 App. D. C. 341, 147 F. (2d) 152.

10. The Petitioner has a substantial interest in the orders complained of as an Applicant to which similar authority has been denied, and as a common carrier by water now serving San Juan, Puerto Rico and the Gulf ports of the United States over routes from which a substantial amount of traffic will be diverted if C & S should institute air transportation services under its certificate. *Pan American Airways Co. v Civil Aeronautics Board*, 121 F. (2d) 810; *Symons Broadcasting Co. v. Federal Radio Commission*, 62 App. D. C. 46, 47, 64 F. (2d) 381; *National Broadcasting Co. v. Federal Communications Commission*, 76 U. S. App. D. C. 238, 240, 132 F. (2d) 545; affirmed 319 U. S. 239, 87 L. Ed. 1374.

11. Upon review of the proceeding above described, Petitioner intends to rely on the following points—

(a) The Respondent erred in denying the Petitioner's application for a Certificate of Public Convenience and Necessity, authorizing the scheduled air transportation of persons and property proposed by the Petitioner.

(b) The Respondent erred in granting the application to C & S for a Certificate of Public Convenience and Necessity.

(c) The Respondent failed to make an appropriate finding that C & S is fit, willing and able, as required by Section 401 (d) of the Act.

(d) The record contains no substantial evidence that C & S is fit, willing and able properly to perform the designated air transportation but, on the contrary, affirmatively shows its lack of fitness and ability.

(e) The Respondent's finding that it is unlikely that the New Orleans-San Juan service will require any substantial subsidy payment if it is conducted as part of an independent airline system, is not only not supported by substantial evidence, but is contrary to the evidence of record.

(f) The Respondent's finding that C & S is the carrier best qualified in the public interest to provide the air transportation service required by the public convenience and necessity between New Orleans, Louisiana, and San Juan, Puerto Rico, is not supported by substantial evidence, is inconsistent with the facts of record and lacks a rational basis.

(g) The Respondent's finding that the selection of C & S to provide the designated air transportation would result in a pattern of air transportation best suited to the development of the maximum volume of traffic is an arbitrary determination and not supported by substantial evidence.

(h) The Respondent's holding that a surface carrier upon an application of Section 401 of the Act must meet the tests of Section 408 (b) of the Act is erroneous as a matter of law.

(i) The Respondent having erred in holding that the Petitioner must meet the test of Section 408 (b) of the Act upon its application under Section 401 of the Act, further erred in failing to find that Petitioner's proposed service fell within the provisions of Section 408 (b) of the Act, and in disregarding the evidence submitted by the Petitioner in support thereof.

(j) The Respondent having erred in holding that the Petitioner must meet the test of Section 408 (b) of the Act, upon its application under Section 401 of the Act, further erred in excluding testimony of qualified experts with respect to the use of aircraft to the public advantage by the Petitioner in its operations within the purview of Section 408 (b) of the Act.

(k) The Respondent has exceeded its authority under the statute in issuing the Certificate of Public Convenience and Necessity to C & S.

(l) The Respondent has erred in failing to require C & S to establish by legal evidence the rate and amount of compensation for the transportation of mail by aircraft which it will require to insure the inauguration and main-

tenance of an adequate air transportation service by C & S on its certificated route.

(m) The Respondent erred in sustaining objections to questions by Petitioner as to the rate and amount of air-mail compensation which C & S would require to inaugurate and maintain an adequate service as aforesaid.

(n) The Respondent erred in denying Petitioner's motion to reopen the proceeding in Docket No. 525, et al., to receive further evidence and for reargument.

(o) The testimony in Docket No. 525, upon which the Respondent based its order granting C & S a Certificate of Public Convenience and Necessity, was completed in October, 1944 and does not reflect present conditions.

(p) The denial of said motion by Respondent further deprived the Petitioner of a hearing on its application, as required by law, in that no opportunity was afforded to present evidence of the changed conditions and circumstances as set forth in said motion.

(q) The Respondent erred in denying the petition of the Petitioner for a rehearing and reconsideration of the decision and orders referred to above.

Wherefore, the premises considered, Petitioner respectfully prays that this Honorable Court review the proceedings and orders referred to herein, and upon such review—

(a) Modify and set aside the orders of Respondent to the extent that a Certificate of Public Convenience and Necessity was issued to C & S;

(b) To set aside so much of Respondent's opinion as includes its findings and conclusions that Petitioner is re-

quired under its application, filed pursuant to Section 401 of the Act, to make the proof required by Section 408 (b) of the Act, relating to the acquisition of control of an air carrier by a common carrier, other than an air carrier;

(c) To order further proceedings by the Respondent herein, to-wit: That the Respondent reopen said proceedings for the purpose of taking further evidence in the proceedings, and reconsidering its decision herein.

(d) And for such other and further relief as to the Court may seem meet and proper.

WATERMAN STEAMSHIP CORPORATION,

By .....

FRANCIS H. INGE,
Attorney for Waterman Steamship Corporation.

403 Merchants National Bank Bldg.,
Mobile 6, Alabama,

BON GEASLIN,
STERLING F. STOUDENMIRE, JR., and
JOSEPH M. PAUL,
520 Investment Building,
Washington, D. C.,
Of Counsel.

September 5, 1946.

Verification.

State of Alabama,
County of Mobile. ss.

Francis H. Inge being duly sworn, on his oath deposes and says that he is the attorney of record for the Water-

man Steamship Corporation, the Petitioner herein, that he is the person who subscribed his name to the foregoing petition, and that the matters and things set forth in said petition are true.

FRANCIS H. INGE.

Subscribed and sworn to before me this 5th day of September, 1946.

ANNIE L. BLACKWELL,
Notary Public.

My commission expires: July 31, 1950.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing Petition on the Civil Aeronautics Board by mailing a copy, properly addressed and postage prepaid to the Board.

.....

FRANCIS H. INGE.

Mobile, Alabama, September 5, 1946.

EXHIBIT A.

Orders
Serial Number 4793.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington, D. C., on the 17th day of May, 1946.

In the matter of the application of Waterman Steamship Corp., and other applications for certificates and amendments of certificates of public convenience and necessity, known as the Latin American Service case.

Docket No. 525 et al.

Order.

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision which is attached hereto and made a part hereof;

It Is Ordered, 1. That the certificate of public convenience and necessity issued to American Airlines, Inc., in Docket No. 510 et al., executed by the Board on April 14, 1942, and approved by the President of the United States on April 16, 1942, be amended so as to authorize American Airlines, Inc., subject to the provisions of said

certificate, to engage in air transportation with respect to persons, property, and mail:

Between the terminal point Mexico City, Mex., the intermediate point Monterey, Mex., and (a) beyond Monterey, the terminal point El Paso, Tex., and (b) beyond Monterey, the intermediate point San Antonio, Tex., and the terminal point Fort Worth-Dallas, Tex., subject to the condition that service to San Antonio shall be provided only on flights originating at Mexico City, Mex., and terminating at Fort Worth-Dallas or a point north thereof, or originating at Fort Worth-Dallas or a point north thereof and terminating at Mexico City.

2. That there be issued to Braniff Airways, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail:

Between the co-terminal points San Antonio, Tex., Laredo, Tex., the intermediate point Monterey, Mex., and the terminal point Mexico City, Mexico.

3. That there be issued to Braniff Airways, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property and mail as follows:

Between the terminal point Houston, Texas, the intermediate points Havana, Cuba, Balboa, Canal Zone, Bogota, Colombia Quito, and Guayaquil, Ecuador, Lima, Peru, La Paz, Bolivia, and Asuncion, Paraguay, and (a) beyond Asuncion, Paraguay, the intermediate

point Sao Paulo, Brazil and the terminal point Rio de Janeiro, Brazil; and (b) beyond Asuncion, Paraguay, the terminal point Buenos Aires, Argentina; subject to the condition that service to Havana, Cuba, shall be provided only on flights originating at Houston, or a point in the United States, and terminating at a point in South America, or on flights originating at a point in South America and terminating at Houston, or a point in the United States.

4. That there be issued to Chicago and Southern Air Lines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail:

Between the co-terminal points New Orleans, La., and Houston, Tex., the intermediate point Havana, Cuba, and (a) beyond Havana the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, Ciudad, Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, the intermediate points Kingston, Jamaica, Aruba, Netherlands West Indies, Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela; subject to the condition that the holder shall not carry persons, property or mail which, with respect to the points named herein in the certificate, originate at New Orleans and terminate at Houston, or originate at Houston and terminate at New Orleans.

5. That there be issued to Colonial Airlines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate to engage in air transportation with respect to persons, property and mail:

(a) Between the terminal point New York, N. Y., and the terminal Hamilton, Bermuda; and

(b) Between the terminal point Washington, D. C., and the terminal point Hamilton, Bermuda.

6. That there be issued to Eastern Air Lines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail as follows:

Between the terminal point New Orleans, La., and the terminal point Mexico City, Mexico.

7. That there be issued to Eastern Air Lines, Inc., a certificate of public convenience and necessity, authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property and mail as follows:

Between the terminal point Miami, Fla., and the terminal point San Juan, Puerto Rico.

8. That there be issued to National Airlines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail:

Between the co-terminal points Tampa and Miami, Fla., and the terminal point Havana, Cuba.

9. That the amended certificate of public convenience and necessity issued to Pan American Airways, Inc., in Docket No. 456, executed by the Board on November 5, 1943, and approved by the President on December 23, 1943, be further amended so as to (a) extend service from Brownsville, Tex., to the terminal point Houston, Tex., via

the intermediate point Corpus Christi, Tex., subject to the condition that the holder shall not carry persons, property or mail which, with respect to the points named in the certificate, originate at Houston, Corpus Christi, or Brownsville and terminate at any of the other of said three points, (b) to substitute Santiago, Cuba, for Antilla, Cuba, as an intermediate point between Camaguey, Cuba, and Port-au-Prince, Haiti, (c) to include Sao Paulo as an intermediate point between Rio de Janeiro and Porto Alegro, Brazil, (d) to authorize the carriage of mail between Port-au-Prince, Haiti, Santiago, Cuba, and Kingston, Jamaica, (e) to substitute Balboa for Cristobal, Canal Zone, (f) to substitute Caracas for La Guaira, Venezuela, and (g) to authorize the carriage of persons, property, and mail between New York, N. Y., and San Juan, Puerto Rico;

10. That the certificate of public convenience and necessity issued to Pan American Airways, Inc., in Docket No. 373, executed by the Board on February 26, 1943, and approved by the President on March 12, 1943, be amended so as to authorize Pan American Airways, Inc., subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail between the co-terminal points Houston, Tex., and New Orleans, La., the intermediate point Merida, Mex., and the terminal point Guatemala City, Guatemala; subject to the condition that the holder shall not carry persons, property or mail which, with respect to the points named herein in the certificate, originate at New Orleans and terminate at Houston, or originate at Houston and terminate at New Orleans;

11. That the amended certificate of public convenience and necessity issued to Pan American-Grace Airways, Inc., in Docket No. 1403, executed by the Board on March 20, 1945, and approved by the President on April 24, 1945, be further amended so as to (a) substitute Balboa, Canal Zone, as a terminal point for Cristobal, Canal Zone, and

(b) extend the Balboa-Buenos Aires operations to the terminal point Montevideo, Uruguay, subject to the condition that service to Montevideo, Uruguay, shall be provided only on flights originating or terminating at Santiago, Chile, or points north thereof, or at Salta, Argentina, or points north thereof;

12. (Vacated by order No. 4801, adopted May 23, 1946.)

13. That Pan American-Grace Airways, Inc., is authorized to operate nonstop service between Balboa, Canal Zone and Guayaquil, Ecuador; between Guayaquil and Lima, Peru; between Lima and Antofagasta, Chile; and between Antofagasta and Buenos Aires;

14. That there be issued to Western Air Lines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail as follows:

Between the terminal point Los Angeles, Calif., and the terminal point Mexico City, Mexico.

15. That the exercise of the privileges granted by said certificates and amended certificates with respect to interstate and overseas air transportation shall be subject to the terms, conditions, and limitations prescribed by sections 238.3 and 238.5 of the Economic Regulations of the Board, all amendments thereto, and such other terms, conditions, and limitations as may from time to time be prescribed by the Board; and that the exercise of the privileges granted by the said certificates and amended certificates with respect to foreign air transportation authorized thereby shall be subject to the terms, conditions, and limitations prescribed by sections 238.4 and 238.7 of the Economic Regula-

tions of the Board, all amendments thereto, and such other terms, conditions, and limitation as may from time to time be prescribed by the Board;

16. That said certificates and amendments of certificates authorized by this order shall be in the form attached hereto, shall be signed on behalf of the Board by the Chairman of the Board, and shall have affixed thereto the seal of the Board attested by the Secretary;

17. That said certificates and amendments of certificates shall be effective from the date of their approval by the President of the United States;

18. That temporary exemption orders dated October 9, 1940 (Order Serial No. 685), dated December 10, 1941 (Order Serial No. 1281), dated February 1, 1944 (Order Serial No. 2665), dated July 13, 1943 (Order Serial No. 2358) and dated July 23, 1944 (Order Serial No. 3024), be vacated upon the issuance of the certificates of public convenience and necessity and amendments thereof hereby authorized to be issued;

19. That the petition of W. R. Grace & Co., intervener, requesting that the Board find that the public interest requires the establishment of a through route by Pan American-Grace Airways, Inc., between New York and points along the west coast of South America, and further requesting that the Board recomended to the President that he require or request Pan American-Grace Airways, Inc., to file an application for such service, be and it hereby is denied; and

20. That all the applications in this proceeding, except to the extent to which they are granted in this decision and by this order, be and they are denied.

By the Civil Aeronautics Board:

(S.) FRED A. TOOMBS,
(Fred A. Toombs),
(Seal) Secretary.

The White House:
Approved:
(S.) HARRY S. TRUMAN.

May 22, 1946.

EXHIBIT B.

Orders.
Serial Number 4795.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 17th day of May, 1946.

In the matter of the application of Waterman Steamship Corp. and other applications for certificates and amendment of certificates of public convenience and necessity, known as the Latin American Service case.

Docket No. 525 et al.

Order Denying Motion.

Waterman Steamship Corporation, an applicant in the above-entitled proceeding, having filed with the Board on

May 6, 1946, a motion requesting the Board to reopen this proceeding to receive further evidence and for reargument; and said motion having alleged in substance (1) that hearings in this consolidated proceeding were held on September and October, 1944, and oral argument thereon held before the Board on or about May 1, 1945; (2) that no decision has yet been published by the Board nor has a certificate of public convenience and necessity been issued; (3) that the statistics and economic data submitted in evidence by the applicants and the Civil Aeronautics Board related to prewar traffic, and the postwar projections of potential traffic were hypothetical and speculative and can not form the basis of a proper decision of the Board on the question of public convenience and necessity; (4) that security regulations and the existence of a state of war prevented the applicants and the United States Government from obtaining information sufficient to base a projected air transportation pattern in the Caribbean area; (5) that the applicant, Waterman Steamship Corporation, is now able to prove that it owns adequate aircraft and other flight equipment and has in its employ the flight, engineering and other personnel adequate to inaugurate and maintain its proposed services, although the applicant was unable to prove said facts at the time of the hearing because of the war; (6) that applicant is informed and believes it can prove that there are at least 5,000 persons in Puerto Rico who have sought in recent months, and are now seeking, to obtain transportation to the United States, and who have been unable to do so because no adequate service is available, and similarly there are in the United States thousands of applicants for transportation to Puerto Rico who are unable to obtain transportation because no adequate service is available, and that applicant was unable to prove said facts at the time of the hearing because of war conditions; (7) that Pan American Airways, Inc., has received from the United States approximately

$75,000,000 for air mail transportation in the Latin American area since its inauguration of Latin American services, during this period such company has not and is not now providing adequate economical and efficient service at reasonable charges between Puerto Rico and the continental United States, and at the hearing held upon this application conceded its inability to provide adequate and efficient air transportation service between such areas at reasonable charges, except under conditions specified by it, which conditions applicant will show are impossible of attainment, and were not made in good faith, and therefore the people of Puerto Rico and in that area of the United States served by the New Orleans gateway, have been deprived of an adequate, economical and efficient air transportation service at a reasonable charge; (8) that Chicago and Southern Air Lines, Inc., Delta Air Corporation, and National Airlines, Inc., have received approximately $3,000,000, $3,500,000 and $2,250,000, respectively, and that notwithstanding the receipt of such payments, neither of said air carriers has provided adequate, economical and efficient transportation over the routes or in the areas which they have been authorized to serve and are not now providing adequate, economical and efficient transportation as aforesaid, and therefore neither of such carriers is fit, willing, or able to provide services between the United States and Puerto Rico required by the public convenience and necessity; (9) that applicant proposes and is prepared to operate over the route specified in its application without the aid of air mail compensation; and (10) that upon the basis of the decision in *Atchison, Topeka and Santa Fe Railway Company v. U. S.*, 284 U. S. 260, applicant is entitled to have the record reopened for the introduction of the evidence of changed conditions alleged in its motion; and

It appearing to the Board and the Board finding (1) that the Board in making estimates of the post-war air traffic in the Caribbean area took cognizance not only of the pre-war statistics but also of the probable post-war growth of such traffic; (2) that evidence relating to air traffic during the war period and the present transition period does not form a sufficient basis for an estimate of future air traffic to warrant the reopening of this proceeding, particularly in view of the delay which would result and which would interfere with the institution of new services to Puerto Rico and other points, and that it is in the public interest to issue as promptly as possible a decision in this proceeding; (3) that the immediate availability of flight equipment and personnel has never been considered by the Board as a factor in deciding upon an application for a certificate of public convenience and necessity, except possibly in the case of certificates issued for the duration of the war; (4) that an insufficiency of flight equipment possessed by Pan American Airways, Inc., Chicago and Southern Air Lines, Inc., Delta Air Corporation, and National Airlines, Inc., caused by war conditions which may not yet have been overcome, and which may have caused a temporary lack of adequate, economical and efficient transportation during the war and at the present time to some extent, is not a new condition which has arisen since the hearing; (5) that the cost of new air services in the form of airmail compensation is only one of the facts considered by the Board in certificating such services, and the willingness of Waterman Steamship Corporation to operate an air service without such compensation as well as the amounts of such compensation paid in the past and required in the future by other applicants were facts known at the hearing and considered by the Board; (6) that the other allegations in the motion relate only to facts which were known at the time of the hearing or which are irrelevant to a proper disposition of this pro-

ceeding; and (7) that therefore the moving party, Waterman Steamship Corporation, has failed to set forth matters sufficient to warrant the reopening of this proceeding to receive further evidence or for reargument;

It Is Ordered, that the motion of Waterman Steamship Corporation be and it hereby is denied.

By the Civil Aeronautics Board.

(S.) FRED A. TOOMBS,
(Fred A. Toombs),
(Seal) Secretary.

EXHIBIT C.

Orders
Serial Number 4977.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington, D. C., on the 12th day of July, 1946.

In the matter of the application of the Waterman Steamship Corp. and other applications for certificates and amendments of certificates of public convenience and necessity, known as the Latin American Service Case.

Docket No. 525 et al.

Order Granting and Denying Petitions for Rehearing, Reargument and Reconsideration.

Colonial Airlines, Inc., having filed on May 27, 1946, a petition for reconsideration of the order of the Board in

the above-entitled matter dated May 17, 1946 (Order Serial No. 4793); Eastern Air Lines, Inc., having filed on June 21, 1946, a petition for reconsideration of said order; Pan American Airways, Inc., having filed on June 20, 1946, a petition for rehearing, reargument and reconsideration of said order; and Waterman Steamship Corporation having filed on June 24, 1946, a petition for rehearing and reconsideration of the orders of the Board dated May 17, 1946 (Order Serial No. 4793 and Order Serial No. 4795); National Airlines, Inc., having filed with the Board a conditional request for the reconsideration of its application for a route between Miami, Fla., and Balboa, C. Z., and American Overseas Airlines, Inc., and Moore-McCormack Lines, Inc., having filed with the Board conditional requests for reconsideration of their applications;

Upon due consideration of said petitions and requests the Board finding that:

1. The matters set forth in the petitions of Colonial Airlines, Inc., and Eastern Air Lines, Inc., and in the request of National Airlines, Inc., indicate that there may be a public need for through service between Balboa, C. Z., one or more of the intermediate points Baranquilla, Colombia, Kingston, Jamaica, Havana, Cuba, and cities in the eastern part of the United States, which need may not have been adequately provided for by the aforesaid order (Order Serial No. 4793), and accordingly that reopening of the proceeding for the purpose of reargument and reconsideration with respect to the application of Colonial, Eastern and National for such service is required in the public interest;

2. The matters set forth in the petition of Pan American Airways, Inc., warrant reopening of the proceeding

for the purpose of reargument and reconsideration insofar as the order therein (Order Serial No. 4793) denies the application of such carrier to serve Curacao, N. W. I., on its Miami-Caracas route and to serve Havana, Cuba, on its Miami-Kingston-Balboa and Miami-Kingston-Barranquilla routes.

3. The other matters set forth in the aforesaid petitions and requests for reconsideration relate to matters duly considered by the Board in its opinion and orders of May 17, 1946, and do not constitute sufficient grounds to justify rehearing, reargument or reconsideration as to said opinion and orders.

It Is Ordered:

1. That the above-entitled proceeding be reopened for the purpose of further argument before the Board and for reconsideration by the Board of the order of May 17, 1946 (Order Serial No. 4793), herein with respect to (a) the denial of the applications of Colonial Airlines, Inc., Eastern Air Lines, Inc., and National Airlines, Inc., insofar as they propose through service between Balboa, C. Z., one or more of the intermediate points Barranquilla, Colombia, Kingston, Jamaica, Havana, Cuba, and cities in the eastern part of the United States; and (b) the denial of the applications of Pan American Airways, Inc., insofar as they propose service at Curacao, N. W. I., on its Miami-Caracas route and at Havana, Cuba, on its Miami-Kingston-Balboa and Miami-Kingston-Barranquilla routes.

2. That the aforesaid petitions and requests in all other respects be and they hereby are denied.

By the Civil Aeronautics Board:

(S.) FRED A. TOOMBS,
(Fred A. Toombs),
Secretary.

(Seal)

EXHIBIT D.

§ 646. Judicial review (Act of June 23, 1938, c. 601 § 1006, 52 Stat. 1024; Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235.)

(a) Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 601 of this chapter, shall be subject to review by the Circuit Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of Court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the Court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board by the clerk of the Court; and the Board shall thereupon certify and file in the Court a transcript of the record, if any, upon which the order complained of was entered.

(d) Upon transmittal of the petition of the Board, the Court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board.

Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the Board.

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the Court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the Court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 346 and 347 of Title 28.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

MOTION OF RESPONDENT TO DISMISS PETITION, OR AFFIRM ORDERS.

Filed November 4, 1946.

In the United States Circuit Court of Appeals for the Fifth Circuit.

U. S. Circuit Court of Appeals. Filed Nov. 4, 1946. Oakley F. Dodd, Clerk.

Waterman Steamship Corporation, Petitioner,
vs. No. 11765.
Civil Aeronautics Board, Respondent.

MOTION OF RESPONDENT CIVIL AERONAUTICS BOARD TO DISMISS THE PETITION FOR REVIEW, OR IN THE ALTERNATIVE, TO AFFIRM RESPONDENT'S ORDERS.

I.

Now comes the Respondent Civil Aeronautics Board and moves the Court to dismiss the Petition for Review heretofore filed herein on September 6, 1946, and respectfully represents unto the Court, that:

1. The Order of Respondent, dated May 17, 1946, Serial Number 4793, sought to be reviewed herein is not within the jurisdiction to review conferred upon this Court by Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 646), since that section does not and cannot operate to confer upon this Court jurisdiction to review the issuance or denial of certificates the issuance or denial of which are subject to the approval

of the President of the United States under Section 801 of such Act (49 U. S. C., Sec. 601).

2. Respondent's Order of May 17, 1946, Serial Number 4793, sought to be reviewed by the petition herein is in effect an order of the President of the United States. No jurisdiction to review such order of the President has been conferred on this Court.

3. This Court by reason of the powers conferred upon the President by Section 801 of the Civil Aeronautics Act of 1938, as amended, (49 U. S. C., Sec. 601), subjecting to his ultimate approval the issuance or denial of the certificate applied for, is without power to render a judgment with finality and conclusiveness, and hence the petition presents no case or controversy to which the judicial power extends.

4. The Orders of Respondent, dated May 17, 1946, Serial No. 4795, and July 12, 1946, Serial No. 4977, sought to be reviewed herein, relate merely to procedural and other matters addressed to the sound discretion of the Respondent Board, and the petition for review herein fails to allege facts sufficient to authorize review of such orders by this Court.

5. The alleged decision of the Board, contained in its Opinion in Docket No. 525, et al., to the effect that a surface carrier upon an application under Section 401 of the Civil Aeronautics Act of 1938, as amended, (49 U. S. C., Sec. 481), must meet the requirements of Section 408(b) of such Act (49 U. S. C., Sec. 488(b)), is upon the face thereof *obiter dictum* and is not an order subject to review under Section 1006(a) (49 U. S. C., Sec. 646(a)) of the Civil Aeronautics Act.

6. The *dictum* hereinbefore described in the foregoing paragraph hereof, presents no case or controversy to which the judicial power extends.

II.

In the alternative, Respondent Civil Aeronautics Board respectfully moves the Court to affirm forthwith the Orders and actions sought to be reviewed herein, and respectfully shows unto the Court, that:

1. If this Court has jurisdiction to review the Order of Respondent, dated May 17, 1946, Serial Number 4793, such Order should be affirmed forthwith for the reason that the basis for the approval thereof by the President is not, cannot be, and is not required to be, a matter of record which can be brought before this Court for consideration in connection with such review.

2. The Orders of Respondent, dated May 17, 1946, Serial Number 4795, and July 12, 1946, Serial Number 4977, relate to mere procedural and other matters addressed to the sound discretion of the Respondent Board and the Petition for Review herein alleges no facts to indicate any abuse by the Board of its discretion.

3. The application of Petitioner for a certificate of public convenience and necessity was disposed of wholly upon its merits by Respondent Board, and the alleged decision contained in the Board's opinion in Docket No. 525, et al., to the effect that a surface carrier applicant for such a certificate must meet the requirements of Section 408(b) of the Civil Aeronautics Act of 1938, as amended, (49 U. S. C., Sec. 488(b)) is upon the face thereof *obiter dictum* and not essential to the adjudication of the merits of Petitioner's application.

III.

Respondent will certify and transmit forthwith to the Clerk of the Court the following documents necessary for the purpose of this Honorable Court in considering Respondent's motion made herein:

1. Application of Waterman Airline, Inc., for a permanent certificate of public convenience and necessity under subdivision (d) of Section 401 fo the Civil Aeronautics Act of 1938, filed December 19, 1940.

2. Amendment No. 1 to the application of Waterman Airline, Inc., for a permanent certificate of public convenience and necessity, filed June 16, 1941.

3. Amendment No. 2 to the application of Waterman Airline, Inc., for a permanent certificate of public convenience and necessity, filed September 27, 1943.

4. Application (as amended) of Waterman Steamship Corporation for a permanent certificate of public convenience and necessity, filed February 9, 1944.

5. Motion of Waterman Steamship Corporation to reopen the proceeding to receive further evidence and for reargument, filed May 6, 1946.

6. Answer of Chicago and Southern Air Lines, Inc., to motion of Waterman Steamship Corporation to reopen proceeding, filed May 20, 1946.

7. Order of the Civil Aeronautics Board, Serial Number 4795, dated May 17, 1946, denying motion of Waterman Steamship Corporation to reopen proceeding.

8. Opinion and Order of the Civil Aeronautics Board, Serial Number 4793, dated May 17, 1946, in Docket No. 525, et al., denying and granting certificates of public convenience and necessity.

9. Petition for rehearing and reconsideration filed by Waterman Steamship Corporation on June 24, 1946.

10. Answer of Chicago and Southern Air Lines, Inc., to petition of Waterman Steamship Corporation for rehearing and reconsideration, filed July 9, 1946.

11. Order of the Civil Aeronautics Board, Serial Number 4977, dated July 12, 1946, denying petition of Waterman Steamship Corporation for rehearing and reconsideration.

12. Rules of Practice under Title IV and Section 1002(d) to (i) of the Civil Aeronautics Act of 1938, as amended, Part 285 of the Economics Regulations of the Civil Aeronautics Board, as amended, to April 24, 1944, and in effect until September 11, 1946.

Wherefore, Respondent Civil Aeronautics Board respectfully moves that the Petition for Review herein be dismissed, or in the alternative, that the Orders and actions of the Respondent Board be affirmed forthwith and the Petition for Review denied.

October 22, 1946.

(S.) EDWARD J. HICKEY, JR.,
(Edward J. Hickey, Jr.),
Special Assistant to the Attorney General,

(S.) H. DON REYNOLDS,
(H. Don Reynolds),
Chief, Enforcement & Litigation Section, Civil Aeronautics Board, Attorneys for Respondent, Civil Aeronautics Board.

Of Counsel:

(S.) WENDELL BERGE,
(Wendell Berge),
Assistant Attorney General,

(S.) HERBERT W. CHRISTENBERRY,
(Herbert W. Christenberry),
United States Attorney,

(S.) JAMES E. KILDAY,
(James E. Kilday),
Special Assistant to the Attorney General,

(S.) EMORY T. NUNNELEY, JR.,
(Emory T. Nunneley, Jr.),
General Counsel, Civil Aeronautics Board,

(S.) JOHN H. WANNER,
(John H. Wanner),
Assistant General Counsel, Civil Aeronautics Board.

MOTION OF RESPONDENT TO WITHHOLD CERTIFICATION AND FILING OF RECORD

Filed November 4, 1946.

In the United States Circuit Court of Appeals for the Fifth Circuit.

U. S. Circuit Court of Appeals, filed Nov. 4, 1946. Oakley F. Dodd, Clerk.

Waterman Steamship Corporation, Petitioner,
vs. No. 11765.
Civil Aeronautics Board, Respondent.

MOTION OF RESPONDENT TO WITHHOLD CERTIFICATION AND FILING OF RECORD.

To the Honorable, The United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Respondent Civil Aeronautics Board and respectfully moves the Court for the entry of an order authorizing Respondent to withhold certification and filing of a copy of the record of the proceedings before Respondent in Docket Number 525, et al., until further order of Court, and in support of such motion respectfully represents unto the Court, that:

1. Respondent heretofore has filed herein its "Motion to Dismiss the Petition for Review, or in the Alternative, to Affirm Respondent's Orders", which motion is undisposed of and now pending before this Honorable Court.

2. Respondent heretofore has certified and filed herein copies of all of petitioner's applications, petition, motions, and related documents, each of Respondent's orders and the opinion in Docket No. 525 referred to in Petitioner's petition for review, and a complete set of Respondent's Rules of Practice. Respondent believes that such documents constitute all relevant portions of the record necessary for the purposes of the Court in considering Respondent's said motion to dismiss the Petition for Review.

3. Respondent contends that this Honorable Court lacks jurisdiction to review the orders and opinion of which review is sought, that upon its face the Petition for Review discloses that it is without merit, and that a ruling on Respondent's Motion to Dismiss will completely dispose of the instant cause without the necessity of further procedural steps or consideration of an extremely volum-

inous record, composed largely of evidence and matters extraneous to the issues herein.

4. The record of the proceeding is currently in use by the Board and is not complete in that such proceeding was reopened for certain purposes and is still pending before the Board, pursuant to Respondent's Order of July 12, 1946, Serial Number 4977, which denied rehearing and reconsideration as to petitioner but reopened the proceeding as to certain other parties on certain limited issues.

Wherefore, Respondent Civil Aeronautics Board respectfully moves the Court for the entry of an order authorizing Respondent to withhold certification and filing of a copy of the record of the proceeding before Respondent in Docket Number 525, et al., until further order of the Court.

(S.) EDWARD J. HICKEY, JR.,
(Edward J. Hickey, Jr.),
Special Assistant to the Attorney General,
(S.) H. DON REYNOLDS,
(H. Don Reynolds),
Chief, Enforcement & Litigation Section, Civil Aeronautics Board, Attorneys for Respondent, Civil Aeronautics Board.

Of Counsel:
(S.) WENDELL BERGE,
(Wendell Berge),
Assistant Attorney General,
(S.) HERBERT W. CHRISTENBERRY,
(Herbert W. Christenberry),
United States Attorney,

(S.) JAMES E. KILDAY,
(James E. Kilday),
Special Assistant to the Attorney General,

(S.) EMORY T. NUNNELEY, JR.,
(Emory T. Nunneley, Jr.),
General Counsel, Civil Aeronautics Board,

(S.) JOHN H. WANNER,
(John H. Wanner),
Assistant General Counsel, Civil Aeronautics Board.

Certification.

I certify that a true copy of the foregoing motion was mailed this 29th day of October, 1946, to:

Francis H. Inge, Esquire, Attorney for Petitioner, 403 Merchants National Bank Building, Mobile 6, Alabama.

Bon Geaslin, Esquire, 520 Investment Building, Washington, D. C.

(S.) EDWARD J. HICKEY, JR.,
(Edward J. Hickey, Jr.),
Special Assistant to the Attorney General.

35 NOTICE OF MOTION OF RESPONDENT TO WITHHOLD CERTIFICATION AND FILING OF RECORD.

In the United States Circuit Court of Appeals for the Fifth Circuit.

Waterman Steamship Corporation, Petitioner,
vs. No. 11765.
Civil Aeronautics Board, Respondent.

To: Francis H. Inge, Esquire,
403 Merchants National Bank Building,
Mobile 6, Alabama.

Bon Geaslin, Esquire,
520 Investment Building,
Washington 5, D. C.,
Counsel for Petitioner.

R. Emmett Kerrigan,
Hibernia Bank Building,
New Orleans 12, Louisiana,
Counsel for Chicago and Southern Air Lines, Inc., Intervenor.

Sirs:

Please Take Notice that respondent on December 2, 1946, or as soon thereafter as counsel can be heard, will present to the United States Circuit Court of Appeals for the Fifth Circuit, its Motion to Withhold Certification and Filing of Record in the above-entitled proceeding, copy of which Motion has heretofore been transmitted to all parties of record.

(S.) EDWARD J. HICKEY, JR.,
(Edward J. Hickey, Jr.),
Special Assistant to the Attorney General,

(S.) H. DON REYNOLDS,
(H. Don Reynolds),
Chief, Enforcement & Litigation Board, Attorneys for Respondent, Civil Aeronautics Board.

November 18, 1946.

60-228-46.

Air Mail.

November 18, 1946.

Francis H. Inge, Esquire,
403 Merchants National Building,
Mobile 6, Alabama.

Re: Waterman Steamship Corporation, Petitioner, v. Civil Aeronautics Board, Respondent, U. S. Circuit Court of Appeals for the Fifth Circuit.

Dear Mr. Inge:

Enclosed please find respondent's Notice of Motion to Withhold Certification and Filing of Record, copy of which motion has been heretofore forwarded to you.

Please acknowledge receipt of this Notice.

Sincerely yours,
WENDELL BERGE,
Assistant Attorney General.

Enclosure No. 484077.

Copies: to: Herbert W. Christenberry, Esquire,
United States Attorney,
New Orleans, Louisiana.
H. Don Reynolds, Esqtire,
Chief, Enforcement & Litigation Section,
Civil Aeronautics Board,
Washington 25, D. C.

37 CERTIFIED PORTIONS OF TRANSCRIPT OF RECORD.

In the United States Circuit Court of Appeals, Fifth Circuit.

Waterman Steamship Corporation, Petitioner,
vs. No. 11765.
Civil Aeronautics Board, Respondent.

Petition for Review of Order of Civil Aeronautics Board.

U. S. Circuit Court of Appeals, filed Nov. 4, 1946. Oakley F. Dodd, Clerk.

(Seal)

Civil Aeronautics Board,
Washington 25.

38 CERTIFICATION OF TRUE COPY.

Washington, D. C., October 11, 1946.

I hereby certify that the annexed are true copies of the original documents, as hereinafter enumerated, on file in the record of proceeedings before the Civil Aeronautics Board in Washington, D. C., In the Matter of the Application of Waterman Steamship Corporation, and other applications for certificates of public convenience and necessity under Section 401 of the Civil Aeronautics Act of 1938, as amended, known as the Latin American Service Case, Docket No. 525 *et al.*:

1. Application of Waterman Airline, Inc., for a permanent certificate of public convenience and necessity

under subdivision (d) of Section 401 of the Civil Aeronautics Act of 1938, filed December 19, 1940.

2. Amendment No. 1 to the application of Waterman Airline, Inc., for a permanent certificate of public convenience and necessity, filed June 16, 1941.

3. Amendment No. 2 to the application of Waterman Airline, Inc., for a permanent certificate of public convenience and necessity, filed September 27, 1943.

4. Application (as amended) of Waterman Steamship Corporation for a permanent certificate of public convenience and necessity, filed February 9, 1944.

5. Motion of Waterman Steamship Corporation to reopen the proceeding to receive further evidence and for reargument, filed May 6, 1946.

6. Answer of Chicago and Southern Air Lines, Inc., to motion of Waterman Steamship Corporation to reopen proceeding, filed May 20, 1946.

7. Order of the Civil Aeronautics Board, Serial Number 4795, dated May 17, 1946, denying motion of Waterman Steamship Corporation to reopen proceeding.

8. Opinion and Order of the Civil Aeronautics Board, Serial Number 4793, dated May 17, 1946, in Docket No. 525, *et al.*, denying and granting certificates of public convenience and necessity.

9. Petition for rehearing and reconsideration filed by Waterman Steamship Corporation on June 24, 1946.

10. Answer of Chicago and Southern Air Lines, Inc., to petition of Waterman Steamship Corporation for rehearing and reconsideration, filed July 9, 1946.

11. Order of the Civil Aeronautics Board, Serial Number 4977, dated July 12, 1946, denying petition of Waterman Steamship Corporation for rehearing and reconsideration.

FRANK K. COGSWELL,
(Frank K. Cogswell)
Assistant Chief, Docket Section, Civil Aeronautics Board.

(Seal)

Civil Aeronautics Board,
Washington 25.

Office of the Secretary of the Board.

I hereby certify that Frank K. Cogswell, who signed the foregoing certificate, is now, and was at the time of signing, Assistant Chief of the Docket Section of the Civil Aeronautics Board, and that full faith and credit should be given his certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board to be affixed this 1th day of October, one thousand nine hundred and forty-six.

M. C. MULLIGAN,
(Seal) (M. C. Mulligan)
Secretary, Civil Aeronautics Board.

Received Docket Section, Proceedings Division, Dec. 19, 1:23 PM, '40, Economic Bureau, Civil Aeronautics Board. 525.

Civil Aeronautics Board.

Application of Waterman Airline, Inc. for a Permanent Certificate of Public Convenience and Necessity Under Subdivision (D) of Section 401 of the Civil Aeronautics Act of 1938.

A certificate is requested authorizing the transportation of persons, property and mail in scheduled operations on a route between the terminal point New Orleans, Louisiana, and the terminal point San Juan, Puerto Rico, via the intermediate point, Tampa, Florida.

Communications from the Board with respect to this application are to be sent to the following:

E. A. Roberts, President,
Waterman Airline, Inc.,
Merchants National Bank Building,
Mobile, Alabama.

Ackgd. 12-19-40.
LOLITA T. FITTER. L. T.

APPLICATION OF WATERMAN AIRLINE, INC. FOR A PERMANENT CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER SUBDIVISION (D) OF SECTION 401 OF THE CIVIL AERONAUTICS ACT OF 1938.

Waterman Airline, Inc. (hereinafter referred to as the "Applicant") respectfully shows to the Civil Aeronautics Board:

1. The full name and address of the Applicant is Waterman Airline, Inc., Merchants National Bank Building, Mobile, Alabama. The Applicant is a corporation duly organized and existing under the laws of the State of Delaware.

2. The Applicant is a citizen of the United States, as defined by Section 1 (13) of the Civil Aeronautics Act of 1938. The President of the Applicant is a citizen of the United States. All the members of its Board of Directors and all its managing officers are citizens of the United States. All the issued and outstanding capital stock of the applicant is owned by Waterman Steamship Corporation (hereinafter referred to as the "Steamship Corporation"). The Steamship Corporation is a corporation duly organized and existing under the laws of the State of Alabama. The President of the Steamship Corporation is a citizen of the United States. All the members of the Board of Directors and all of the managing officers of the Steamship Corporation are citizens of the United States. The Applicant believes that 100% of the voting interest of the Steamship Corporation is owned by citizens of the United States and is prepared to pre-

sent evidence showing that in excess of 75% of the voting interest of the Steamship Corporation is so owned.

The evidence which the Applicant will be prepared to present in support of its citizenship includes certified copies of the certificates of incorporation of the Applicant and of the Steamship Corporation, affidavits or oral testimony by the President, the directors and other managing officers of the Applicant and of the Steamship Corporation with respect to their citizenship, and affidavits of the holders of at least 75% of the voting interest of the Steamship Corporation and oral testimony of the officers of the Steamship Corporation with respect to the citizenship of the stockholders of the Steamship Corporation.

3. The Applicant requests a permanent certificate of public convenience and necessity authorizing it to engage in the scheduled transportation of persons, property and mail between the terminal points New Orleans, Louisiana, and San Juan, Puerto, Rico, via the intermediate point Tampa, Florida. The Applicant also requests such authority as may be necessary to enable it to make regular stops on such route at Miami, Florida, for refueling purposes only, when this is necessary or desirable. The Applicant does not request authority to engage in the transportation of persons, property or mail originating at or destined to Miami. [Amded. 1-2.]

4. Attached hereto as Exhibit A is a map which has been drawn approximately to scale and which shows all terminal and intermediate points to be served on the proposed route of the Applicant. This map gives the approximate mileages between all adjacent points and the principal over-all distances. It also indicates all of such terminal and intermediate points which are now

served by air carriers, indicating by arrows the directions flown by such inter-connecting carriers and stating their principal terminals. This map also shows the route presently followed by the steamers of the Steamship Corporation between New Orleans, Tampa and San Juan.

5. The Applicant has no reasonable grounds for believing that any other person intends to apply for a certificate covering any part of the route included in this application.

6. The Applicant has caused notice of its intention to file this application with the Board to be served upon each person named in the most recent list of air carriers and applicants for certificates of public convenience and necessity. A copy of such notice is attached hereto as Exhibit B. Service of such notice is being made by mailing a copy thereof by registered mail, postpaid, to each such person on December 19, 1940.

7. Attached hereto as Exhibit C is a map drawn in accordance with instructions, contained in subdivision (1) of paragraph (1) of Section 238.1 of the Economic Regulations, showing all air transportation operations serving any of the points covered by this application and all proposed operations between any of such points which the Applicant has reason to believe are about to be started or applied for.

8. Attached hereto as Exhibit D is a general description of all landing areas (as defined in Section 1 (22) of the Civil Aeronautics Act of 1938) along the route covered by this application. All such landing areas are adequate for use for the purposes indicated in such exhibit by the types of aircraft which the Applicant proposes to use in its operations. The location of these landing areas is shown on the map attached hereto as Exhibit E-1.

9. Attached hereto as Exhibit E is a general description of the existing navigation facilities, at the terminal and intermediate points on the proposed route and of the air navigation facilities which the Applicant proposes to install at its own expense at these points. All existing air navigation facilities along the proposed route are shown on the map attached hereto as Exhibit E-1. In addition to the air navigation facilities shown in Exhibits E and E-1, the aircraft of the Applicant will be able to maintain radio communication with the vessels of the Steamship Corporation which operate along the proposed route and will thus be able to obtain additional weather data along such route.

10. Various studies have been made for the Applicant concerning the practicability and feasibility of air transportation operations over the route covered by this application. The Applicant proposes to conduct survey and other experimental flights over the proposed route prior to commencing scheduled operations, in addition to the proving and other flights which may be required by the Civil Aeronautics Authority.

For the past fourteen years the Steamship Corporation has been operating steamship carrying freight and a limited number of passengers between various United States Gulf ports, including New Orleans and Tampa, and Puerto Rico. The operating and traffic information and experience acquired by the Steamship Corporation with respect to the trade between points on the Gulf of Mexico and Puerto Rico will be available to the Applicant.

11. The operations proposed by the Applicant at the present time are essentially a daylight service, but the Applicant proposes to carry on night operations into or out of New Orleans and San Juan if such operations be-

come necessary or desirable during the shorter days of the year or because of operating conditions or connecting schedules. The Applicant proposes to engage in visual contact, instrument and over-the-top operations.

12. The proposed route of the Applicant runs from New Orleans in a southeasterly direction across the Gulf of Mexico to Tampa. From Tampa to San Juan the route continues in a southeasterly direction across the State of Florida, passing over Miami. It continues over the Atlantic Ocean to San Juan, passing to the south of Andros Island and Great Inagua Island and to the north of and approximately parallel to the north coasts of Cuba, Haiti, the Dominican Republic and Puerto Rico.

The route lies over water with the exception of that portion just east of New Orleans and of that portion which crosses Florida, where the terrain in both instances is generally flat with elevations not exceeding 500 feet. There are some small mountain ranges in Cuba lying approximately 100 miles south of the route which do not exceed 3,000 feet in elevation. There are also some mountain ranges in Haiti, the Dominican Republic, and Puerto Rico which lie from 20 to 50 miles south of the route and have maximum elevations of 3,500 feet. There are no unusual meteorological or other conditions prevalent in the region through which the proposed route will pass which might be expected to interfere with the safety or regularity of the proposed operations.

13. The Applicant proposes to use on the route applied for two four engine land planes. The type of four engine plane which the Applicant will use has not yet been definitely selected by the Applicant, but it is expected that it will have seating capacity for approximately thirty passengers. It is estimated that the cost

of each of such planes, fully equipped, will be approximately $350,000. Pending delivery to the Applicant of such four engine aircraft, the Applicant proposes to use two twin-engine land planes. It is expected that each such twin-engine plane will cost approximately $125,000, fully equipped. The Applicant will own reserve engines, propellers, instruments and other equipment.

14. Attached hereto as Exhibit F are the schedules which the Applicant proposes to fly at the beginning of operations and the schedules it plans to operate at the end of the first year of operations, assuming that twin-engine planes are used. Attached hereto as Exhibit F-1 are the schedules which the Applicant proposes to fly at the beginning of operations, and the schedules it proposes to fly during the second year of operations, assuming that four engine planes are used.

15. The populations of the specific terminal and intermediate points to be served on the proposed route are estimated as follows:

New Orleans, Louisiana	492,000
Tampa, Florida	108,000
San Juan, Puerto Rico	169,000

In addition to these terminal and intermediate points, the proposed route would likewise serve the entire territory of Puerto Rico and a large portion of continental United States. The population of Puerto Rico is estimated at approximately 1,870,000 and that of the continental United States at approximately 131,000,000.

16. Attached hereto as Exhibit G are estimates, for each of the first two years of operation with twin-engine planes, of (a) the amount of traffic the Applicant will

receive in each class of service to be rendered, (b) its gross revenues in dollars for each such class of traffic, and (c) the net profit for all operations, after depreciation and taxes (except income taxes), but before interest. Attached hereto as Exhibit G-1 are similar estimates for each of the first three years of operation, based on the assumption that four-engine planes will be used during such years. Neither of such exhibits includes any estimate of the revenue which the Applicant would receive as compensation for transporting the mail.

17. Attached hereto as Exhibit H is a balance sheet of the Applicant showing its present financial condition. The Applicant estimates that its additional capital requirements, if the application is granted, will be approximately $600,000 for twin-engine planes and approximately $1,000,000 for four-engine planes. All such additional capital requirements will be furnished to the Applicant by the Steamship Corporation either through the purchase of additional shares of capital stock of the Applicant or through loans or by a combination of such methods. The capital requirements of the Applicant can be furnished to the Applicant by the Steamship Corporation without additional financing by the Steamship Corporation. Attached hereto as Exhibit I is a balance sheet of the Steamship Corporation as of September 30, 1940, showing the financial condition of the Steamship Corporation as of that date.

18. The Applicant was incorporated under the laws of the State of Delaware on December 3, 1940. Its parent corporation, the Steamship Corporation, has, however, been engaged in the operation of a steamship service since 1919. The Steamship Corporation and its wholly-owned subsidiaries at present operate a fleet of 34 vessels in the commerce of the United States.

E. A. Roberts, President and a director of the Applicant, has been connected with various transportation companies as an executive officer for over twenty years. He is now President and a director of the Steamship Corporation, Pan Atlantic Steamship Corporation, Waterman Steamship Agency, Ltd., Gulf Shipbuilding Corporation and other companies affiliated with the Steamship Corporation. Such companies have all proved financially successful and their operations have steadily expanded under the management of Mr. Roberts.

Lyman S. Peck, Vice-President and General Manager and a director of the Applicant, has devoted his entire time to aircraft operations, airport engineering and airline management since 1917, except for the period from 1920 to 1923, when he was engaged in the construction business as manager for Thompson-Starrett Company. From 1917 to 1919 Mr. Peck served as a pilot in the U. S. Naval Reserve, retiring with the rank of Lieutenant, J. G. From 1924 to 1928 he was engaged in airport engineering and construction work and during this period he had direct charge of the building of several large airports. In 1929 he entered the service of the Pan American Airways system as Vice-President and General Manager of New York Airways, Inc., which operated between New York and Atlantic City. He later served as manager of Pan American Airways Company in connection with its operations between Boston and Halifax, N. S., and as Vice-President and General Manager of Pacific Alaska Airways, Inc. operating air lines throughout Alaska. He resigned his position with Pan American Airways, in 1939 to undertake consulting work in the aviation filed. Mr. Peck became associated with the Steamship Corporation late in 1939 and since that time has been engaged in studies and other work in connection with the plans for operations over the proposed route.

Waverly B. Garner, Vice-President and a director of the Applicant, is Vice-President, Traffic Manager and a director of the Steamship Corporation and has been connected with steamship traffic matters along the route proposed to be operated by the Applicant for over thirty years.

H. L. Arens, Assistant to the President and a director of the Applicant, has been associated with the steamship transportation business for the last seventeen years. He became associated with the Steamship Corporation in July, 1934, and served as special European representative of the Steamship Corporation until 1936. From 1936 to 1939 Mr. Arens was in charge of the Contract Department of the Waterman Steamship Agency, Ltd. Since the Fall of 1939 Mr. Arens has been engaged in investigation and research for the Steamship Corporation in connection with the potentialities of and the plans for the proposed route and the organization of the Applicant. Mr. Arens has held a United States pilot's license since 1931, and now holds a commercial pilot's license and instrument rating. While in Europe he also held British and Dutch pilot licenses.

H. C. Slaton, Secretary, Treasurer and a director of the Aplicant, is Secretary-Treasurer and a director of the Steamship Corporation and has been in charge of financial and accounting matters relating to ocean transportation for over twenty years.

C. B. Waterman, a director of the Applicant, is Vice-President and a director of the Steamship Corporation. He has been closely connected with the Gulf of Mexico-Puerto Rican traffic of the Steamship Corporation for several years and is at the present time traffic manager of that service for the Steamship Corporation. Mr. Wa-

terman is generally familiar with aeronautical matters, holding a private pilot's license and flying his own plane.

Daniel E. Ellis will serve as Operations Manager of the Applicant. Mr. Ellis received his early aeronautical training in the United States Army Air Corps in 1917 and served as instructor at Post Field in 1918-1919. He was admitted to the bar in the State of Mississippi in July, 1920, and practiced law for approximately four years. From 1923 to 1928 he participated in various business activities. In 1928 and 1929 Mr. Ellis assisted in the organization and development of Latin-American Airways, which operated a route between Los Angeles and Salvador via Mexico City and Guatemala. In 1929-1930 he was Operations Manager of Cia. Pickwick-Latin Americana, operating in Mexico, Guatemala and Salvador. In 1930 Mr. Ellis organized Cia. Nacional de Aviacion, Guatemala, and served as Operations Manager of that company, which conducted domestic air transportation in Guatemala, from 1930 to 1933. In 1934 he became assistant to the Operations Manager of the Western Division of Pan American Airways, Inc. From 1935 to 1938 he was Superintendent of Operations of Cia. Mexicana de Aviacion. From September 1938 to August 1940 Mr. Ellis served as Airways Facilities Specialist in the Technical Development Division of the Civil Aeronautics Authority. Since August 28, 1940 Mr. Ellis has been on active duty with the United States Army, serving in the office of the Chief of the Air Corps, Engineering Section, Buildings and Grounds Division. Mr. Ellis plans to join the staff of the Applicant upon the termination of his active duty orders with the United States Army.

E. Emile Rackle, Communications Superintendent of the Applicant, has been engaged in commercial radio communications activities since 1927. During this period he has been employed as a radio operator by an aviation company and a number of steamship companies. He acquired experience in the operation and maintenance of modern tube equipment, low, intermediate and high frequencies, and radio direction finders of both aircraft and ground stations, and participated in various phases of radio communication with stations of numerous foreign countries. Mr. Rackle has also served at the coastal station of the Mackay Radio & Telegraph Company at Southampton, Long Island. He has been in charge of the communication system of the Steamship Corporation during the past three years.

19. There are no facts not elsewhere disclosed in this application which are known to the Applicant and the persons verifying this application which tend to show a probability (a) that the proposed operations could not or would not be conducted with a high degree of safety to the traveling public, or (b) that the cost to the Government for the transporting of the mail, in order to enable the proposed operation to be financially successful, would be excessive, or (c) that the granting of such certificate would deprive other air carriers of substantial parts of their revenues.

Wherefore, the Applicant prays that the Board issue to the Applicant a permanent certificate of public convenience and necessity authorizing the Applicant to engage in the scheduled transportation of persons, property and mail between the terminal points New Orleans, Louisiana, and San Juan, Puerto Rico, and the inter-

mediate point Tampa, Florida, via Miami, Florida, as herein requested.

Respectfully submitted,

WATERMAN AIRLINE, INC.,
By E. A. ROBERTS,
(E. A. Roberts)
President.
By LYMAN S. PECK,
(Lyman S. Peck)
Vice-President and General Manager.
By H. C. SLATON,
(H. C. Slaton)
Treasurer.

49 VERIFICATION OF THE CHIEF EXECUTIVE.

State of Alabama,
County of Mobile, ss.

E. A. Roberts, being duly sworn, deposes and says that he is the President and chief executive officer of Waterman Airline, Inc., the Applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing application and the attached exhibits; that he intends and desires that in granting or denying the rights and privileges applied for thereunder, the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; that to the best of his information and belief; every statement contained in the application is true and no such statement is misleading; and that, in his opinion, the application does not omit to state any facts known to him

which would be deemed by the Board to be of importance to it in reaching its determinations in connection therewith.

E. A. ROBERTS.

Subscribed and sworn to before me by the affiant above named this 18th day of December, 1940.

EUNICE MURRAY.

(Notarial Seal)

My Commission Expires November 7, 1943.

50 VERIFICATION OF THE CHIEF OPERATING OFFICER.

State of New York,
County of New York, ss.

Lyman S. Peck, being duly sworn, deposes and says that he is the Vice-President and General Manager and chief operating officer of Waterman Airline, Inc., the Applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing application and the attached exhibits; that he intends and desires that in granting or denying the rights and privileges applied for thereunder, the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; that to the best of his information and belief, every statement contained in the application is true and no such statement is misleading; and that, in his opinion, the application does not omit to state any facts known to him which would be deemed by the Board to be of importance to it in reaching its determinations in connection therewith.

LYMAN S. PECK.

Subscribed and sworn to before me by the affiant above named this 17th day of December, 1940.

HARRY J. DONAGHY, JR.,
(Harry J. Donaghy, Jr.)
Notary Public, Kings County.

(Notarial Seal)

Clerk's No. 272, Reg. No. 2311. N. Y. Co. Clks. 862, Reg. No. 2D499. Commission expires March 30, 1942.

51 VERIFICATION OF THE CHIEF FINANCIAL OFFICER.

State of Alabama,
County of Mobile, ss.

H. C. Slaton, being duly sworn, deposes and says that he is the Treasurer and chief financial officer of Waterman Airline, Inc., the Applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing application and the attached exhibits; that he intends and desires that in granting or denying the rights and privileges applied for thereunder, the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; that to the best of his information and belief, every statement contained in the application is true and no such statement is misleading; and that, in his opinion, the application does not omit to state any facts known to him which would be deemed by the Board to be of importance to it in reaching its determinations in connection therewith.

H. C. SLATON.

Subscribed and sworn to before me by the affiant above named this 18 day of December, 1940.

EUNICE MURRAY.

(Notarial Seal)

My Commission Expires November 7, 1943.

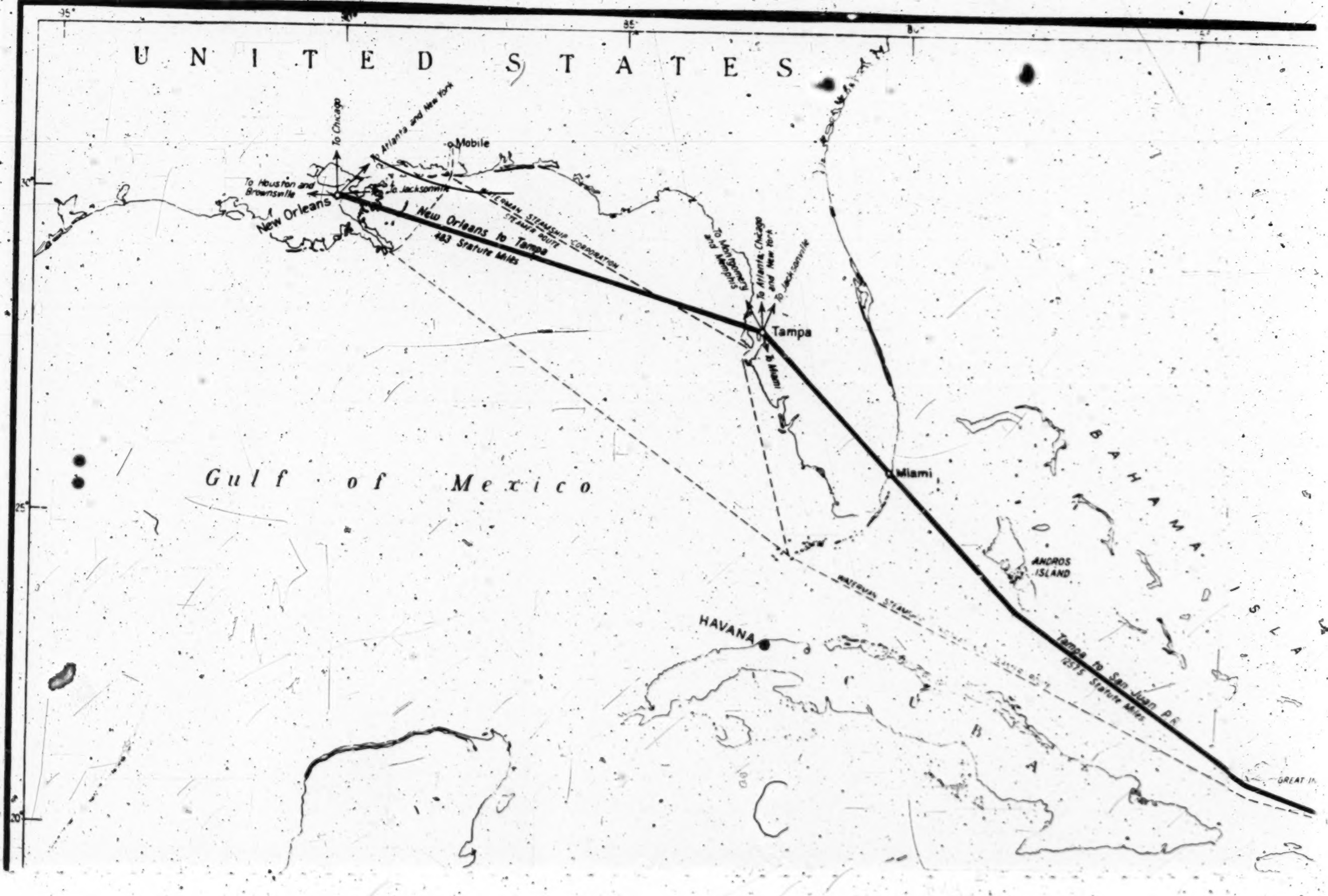

UNITED STATES
Gulf of Mexico
To Chicago
To Atlanta and New York
Mobile
To Houston and Brownsville
New Orleans
To Jacksonville
FREEMAN STEAMSHIP CORPORATION STEAMER ROUTE
New Orleans to Tampa
483 Statute Miles
To Montgomery and Memphis
To Atlanta, Chicago and New York
To Jacksonville
Tampa
To Miami
Miami
BAHAMA ISLANDS
ANDROS ISLAND
GULFPORT STEAMER ROUTE
HAVANA
Tropic of Cancer
Tampa to San Juan P.R.
1575 Statute Miles
CUBA
GREAT I
35°
85°
25°
20°

EXHIBIT A

56

WATERMAN AIRLINE, INC.

MAP

As required under Section 238.1 of the Economic Regulations

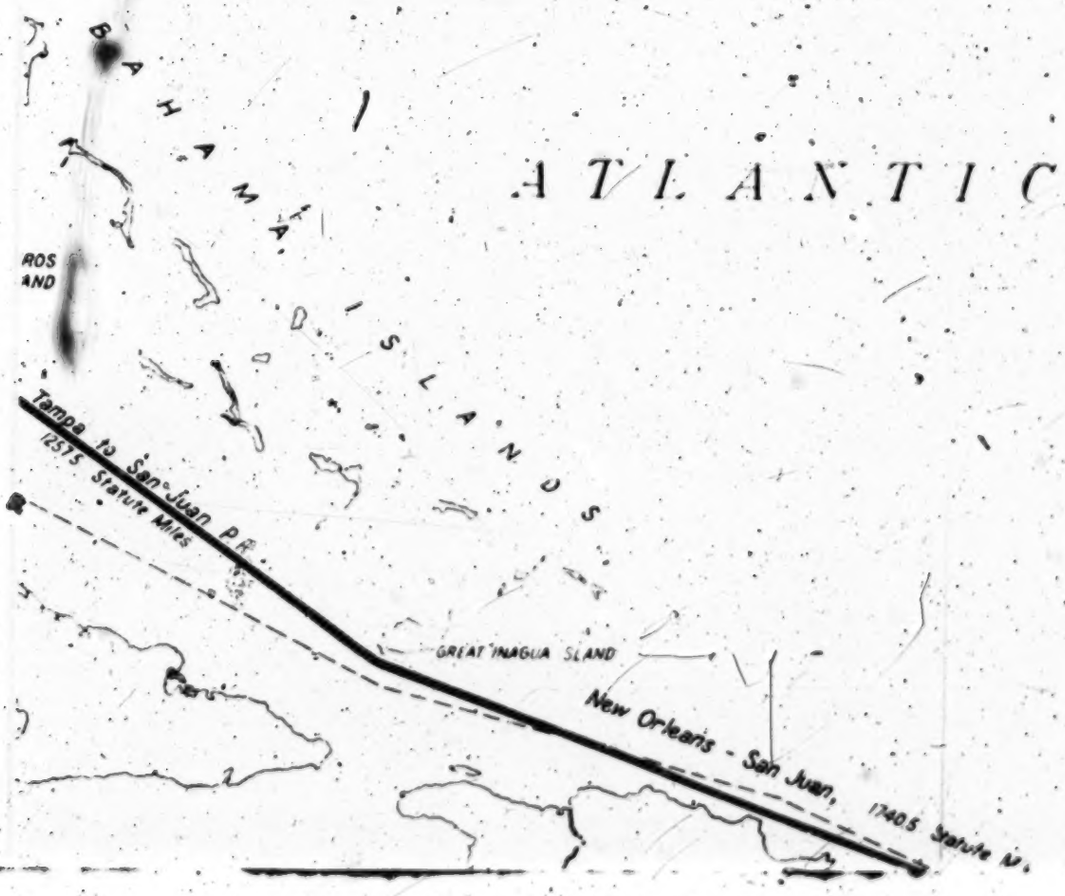
of

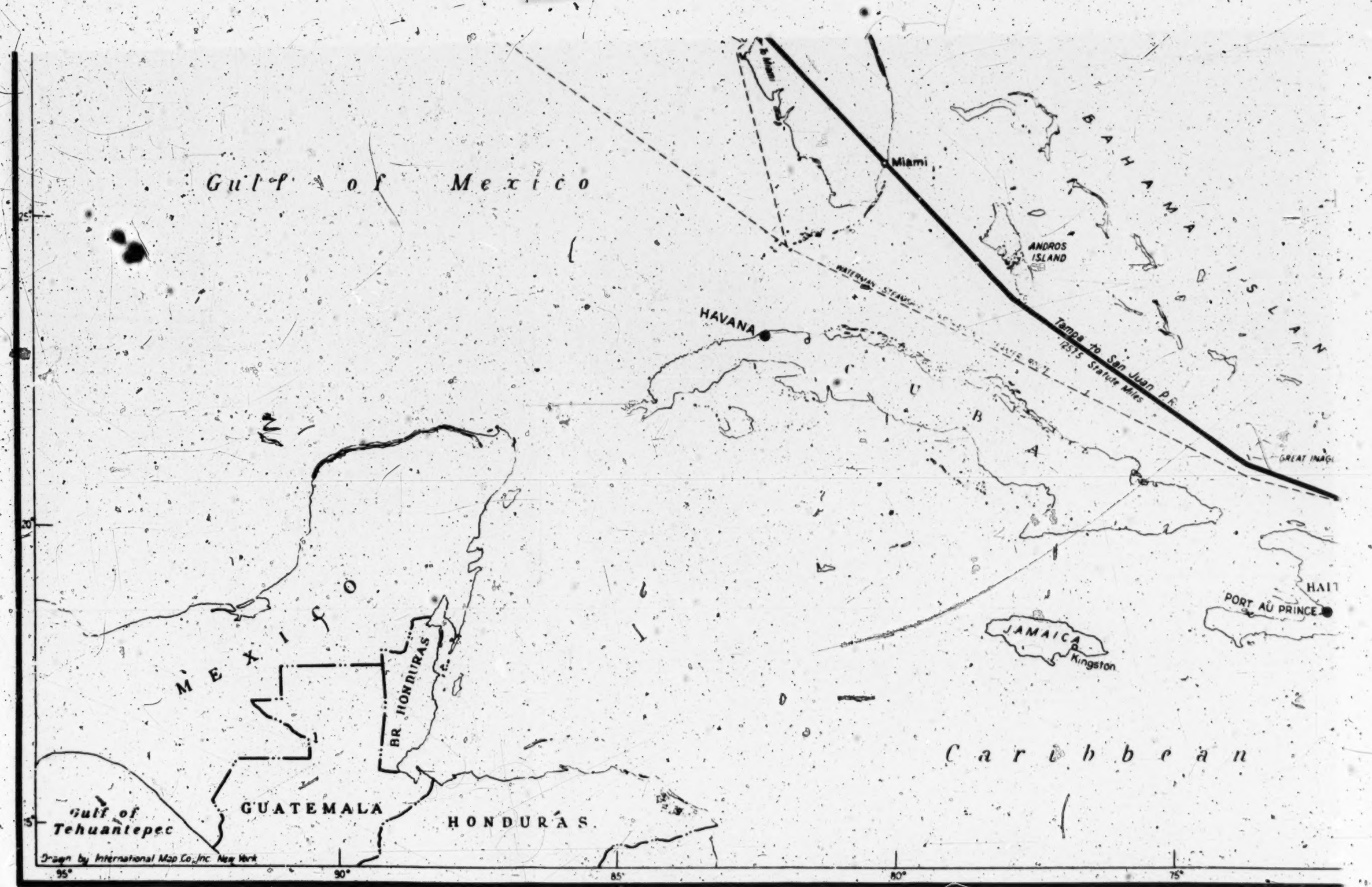
CIVIL AERONAUTICS BOARD

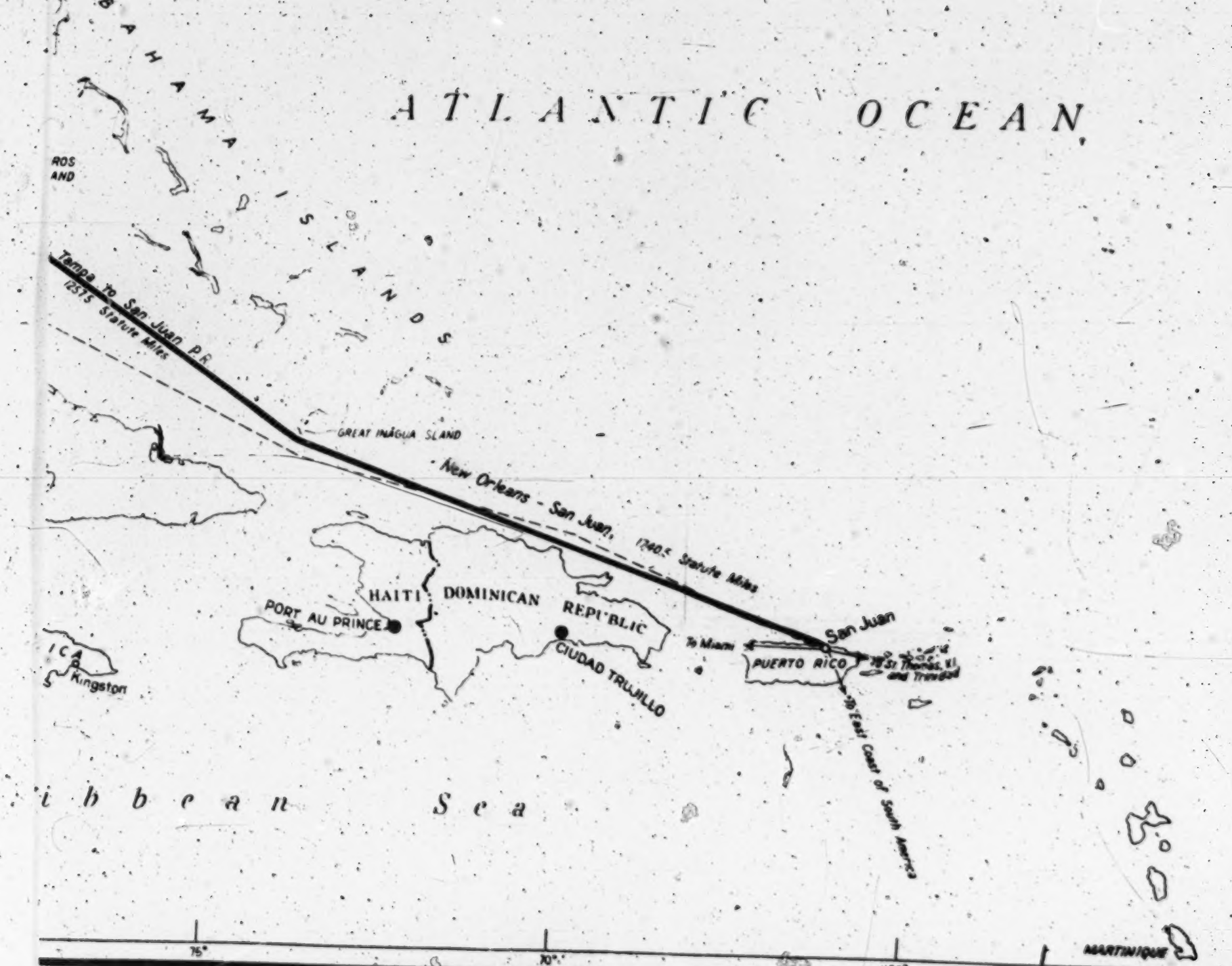
Showing all terminals and intermediate points to be served, with approximate mileages between all adjacent points and the principal overall distances. Arrows indicate points served by interconnecting air carriers.

Scale

0 50 100 150 200 250 300 MILES




Gulf of Mexico
Miami
Tampa to San Juan P.R.
1515 Statute Miles
ANDROS ISLAND
BAHAMA ISLAN
HAVANA
CUBA
GREAT INAGU
HAITI
PORT AU PRINCE
JAMAICA
Kingston
Caribbean
MEXICO
BR. HONDURAS
GUATEMALA
HONDURAS
Gulf of Tehuantepec
Drawn by International Map Co., Inc. New York
95°
90°
85°
80°
75°


ATLANTIC OCEAN
BAHAMA ISLANDS
ROS AND
Tampa to San Juan P.R.
1257.5 Statute Miles
GREAT INAGUA ISLAND
New Orleans - San Juan, 1240.5 Statute Miles
HAITI
DOMINICAN REPUBLIC
PORT AU PRINCE
CIUDAD TRUJILLO
To Miami
San Juan
PUERTO RICO
St Thomas, V.I. and Trinidad
To East Coast of South America
ICA
Kingston
ibbean Sea
75°
70°
MARTINIQUE

53 EXHIBIT B.

Waterman Airline, Inc.,
Merchants National Bank Bldg.,
Mobile, Alabama.

December 19, 1940.

Dear Sir:

You are hereby notified of the intention of Waterman Airline, Inc., to file with the Civil Aeronautics Board an application for a permanent certificate of public convenience and necessity authorizing it to engage in the scheduled transportation of persons, property and mail between the terminal points New Orleans, Louisiana, and San Juan, Puerto Rico, via the intermediate point Tampa, Florida. Such application will also request such authority as may be necessary to enable Waterman Airline, Inc. to make regular stops on such route at Miami, Florida, for refueling purposes only, when this is necessary or desirable. No authority to engage in the transportation of persons, property or mail originating at or destined to Miami is being requested.

Very truly yours,
WATERMAN AIRLINE, INC.,
By E. A. ROBERTS,
President.

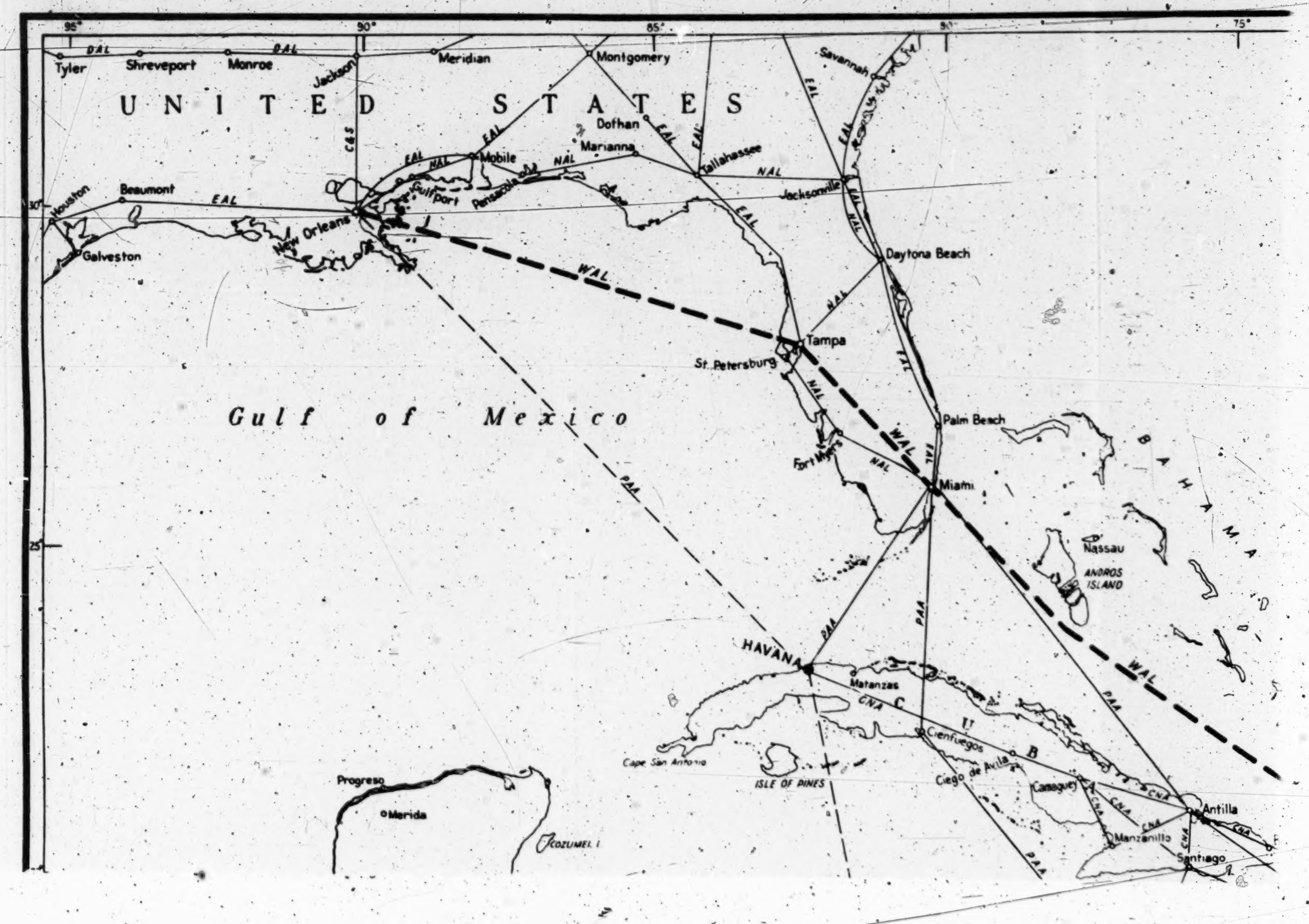

95°
90°
85°
80°
75°
30°
25°
UNITED STATES
Gulf of Mexico
BAHAMA ISLANDS
Tyler
Shreveport
Monroe
Jackson
Meridian
Montgomery
Savannah
Dothan
Marianna
Mobile
Tallahassee
Jacksonville
Houston
Beaumont
Galveston
New Orleans
Gulfport
Pensacola
Daytona Beach
Tampa
St. Petersburg
Fort Myers
Palm Beach
Miami
Nassau
ANDROS ISLAND
HAVANA
Matanzas
Cienfuegos
Cape San Antonio
ISLE OF PINES
Ciego de Avila
(Camagüey)
Manzanillo
Antilla
Santiago
Progreso
Merida
COZUMEL I.
DAL
EAL
NAL
WAL
PAA
CNA
C&S
FEC

EXHIBIT C

58

LEGEND

All Services shown handle passengers, mail and express.
Full lines represent existing routes, Dash lines, routes applied for.

- WAL - WATERMAN AIRLINE
- C&S - CHICAGO AND SOUTHERN AIRLINES
- CNA - Cia. NACIONAL CUBANA DE AVIACION
- EAL - EASTERN AIRLINES
- PAA - PAN AMERICAN AIRWAYS
- NAL - NATIONAL AIRLINES
- DAL - DELTA AIRLINES

WATERMAN AIRLINE, INC.

MAP

As required under sub-section L(1) of Section 238.1 of the Economic Regulations of

CIVIL AERONAUTICS BOARD

Showing all air transportation operations serving any of the points covered by this application.

75° 70° 65° 30° 25° 20°

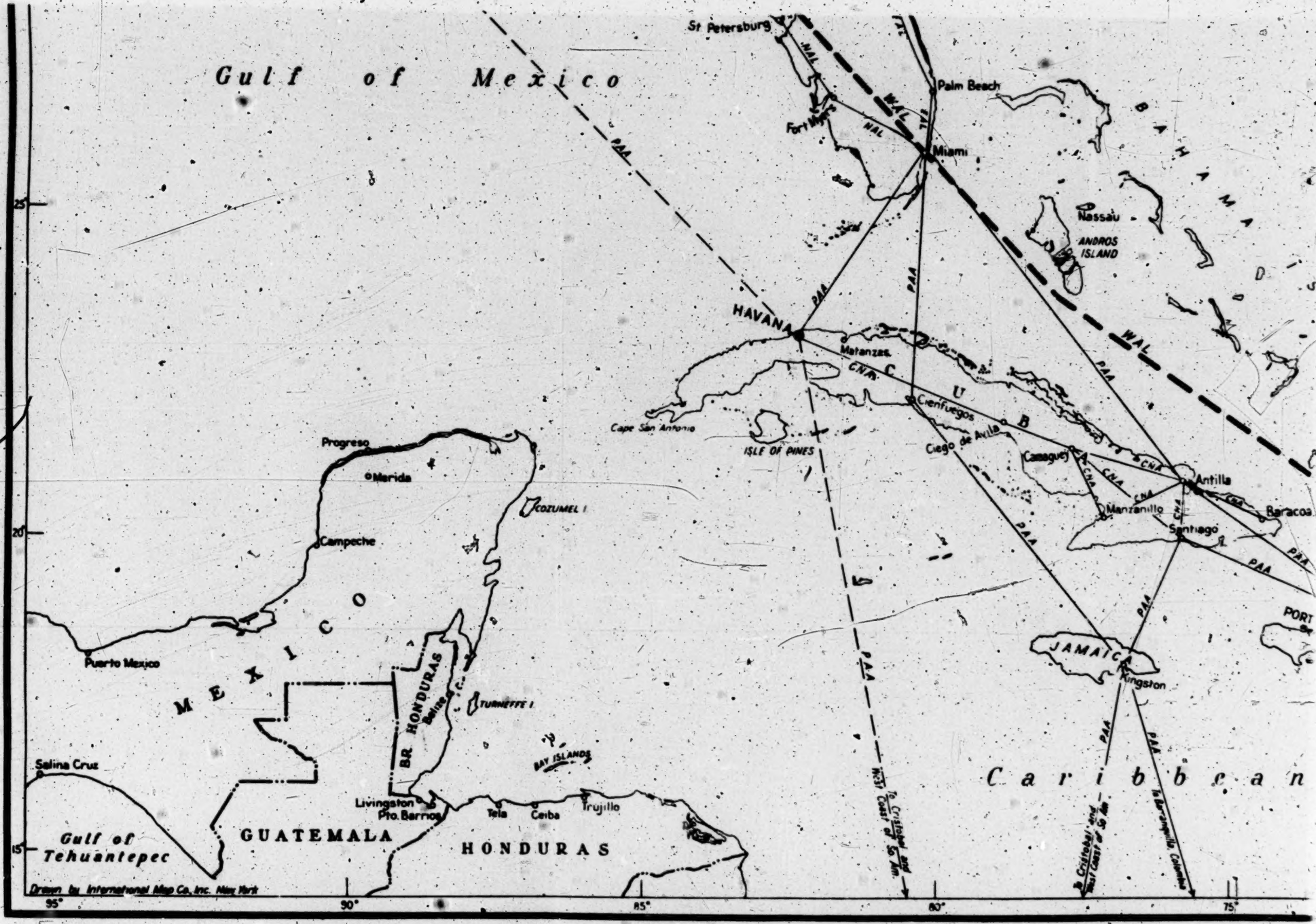
Scale
0 30 100 150 200 250 300 MILES

ATLANTIC OCEAN

BAHAMA ISLANDS

ssau
IROS AND

WAL
PAA
CNA
CNA
CNA
CNA
CNA
Antilla
Manzanillo
Santiago
Baracoa
GREAT INAGUA ISLAND
WAL



Drawn by International Map Co., Inc. New York

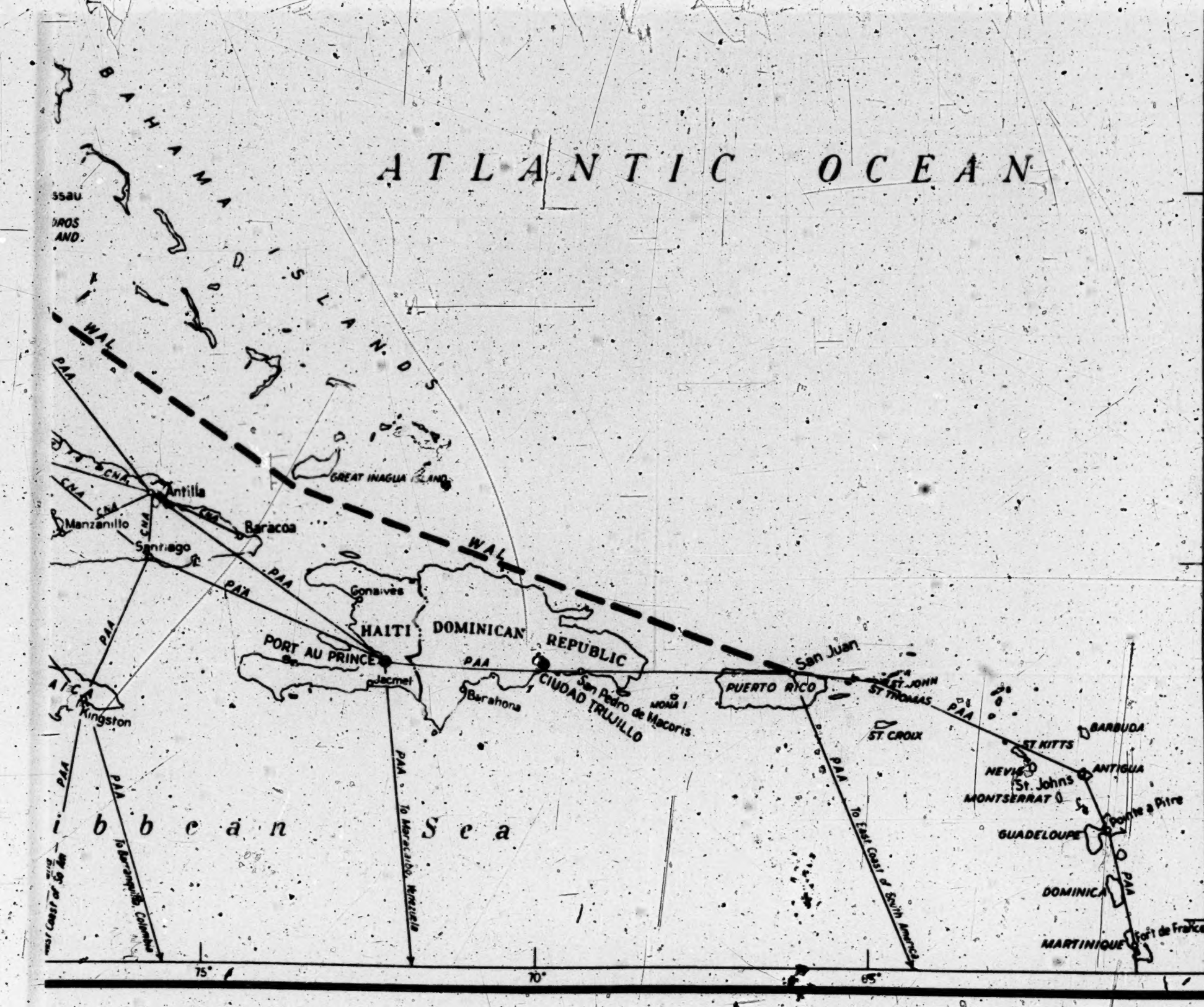

ATLANTIC OCEAN
BAHAMA ISLANDS
WAL
WAL
GREAT INAGUA ISLAND
Antilla
Baracoa
Manzanillo
Santiago
Gonaives
HAITI
DOMINICAN REPUBLIC
PORT AU PRINCE
Jacmel
Barahona
CIUDAD TRUJILLO
San Pedro de Macoris
MONA I
San Juan
PUERTO RICO
ST JOHN
ST THOMAS
ST CROIX
BARBUDA
ST KITTS
NEVIS
St. John's
ANTIGUA
MONTSERRAT
Pointe a Pitre
GUADELOUPE
DOMINICA
MARTINIQUE
Fort de France
Kingston
PAA
To Maracaibo, Venezuela
To East Coast of South America
To Barranquilla, Colombia
75°
70°
65°

EXHIBIT D.

Description of Landing Areas.

(1) Scheduled Landing Fields.

New Orleans, La.

Description:	Municipal; 6½ miles N.E. of City on Lake Pontchartrain; 250 acres; altitude 7′.
Runways:	Four asphalt paved, 3700′ N/S; 3100′ E/W; 4000′ NW/SE; 3200′ NE/SW, each 100′ in width.
Obstructions	Pole line to south.
Markings:	AIRPORT, NEW ORLEANS, on hangar.
Lighting:	Beacon, boundary, approach, obstruction, landing area floodlights.
Communications:	Telephone, telegraph, teletype, 2-way radio.
Weather Reports:	At field.
Service Facilities:	Gas and oil. Hangar and shop.

Tampa, Fla.

Description:	Knight Field, municipal; 2½ miles S. of Post Office; altitude 8′; 100 acres.
Runways:	Paved; 3300′ N/S, 1800′ E/W, 2300′ NE/-SW, all 100′ in width.
Obstructions:	Trees W. of E/W runway.
Markings:	Name on hangar.
Lighting:	Beacon, boundary and obstruction lights.
Communications:	Telephone, telegraph, teletype, 2-way radio.
Weather Reports:	At field.
Service Facilities:	Day service; night by request. Knight Field is being improved at present and, on completion, will have a 3500′ N/S runway, and 4000′ NE/SW runway and a 3500′ N/NW E/SE runway.

Miami, Fla.

Description:	Municipal; 10 milies N.W. of City, altitude 12′; rectangular 200 acres.
Runways:	Four paved runways, 3200′ NW/SE and NE/SW; 1960′ S/W E/W; 2360′ N/S; each 200′ in width.
Obstructions:	Pole line E.
Markings:	MIAMI on hangar roof.
Lighting:	Beacon, boundary, range, flood and obstruction lights.
Communications:	Radio, telegraph, and telephone.
Weather Reports:	At field.
Service Facilities:	Day and night.

San Juan, Puerto Rico

Description:	Isla Grande Airport, U. S. Navy Field, located on Isla Grande, about 1 miles S.E. of San Juan; altitude 7′.
Runways:	Macadam runway 4200′ E/W and will be extended to 5000′ when fill is completed.
Obstructions:	Hangar, building, and radio masts to NW. Large water tank, 213′ above sea level, painted in yellow and black checks and marked by a red light at night, located 700 yards S.E. of El Morro Lighthouse.
Markings:	Illuminated wind cone. PAN AMERICAN AIRWAYS, INC. on side of hangar.
Lighting:	Revolving white beacon. Boundary, approach, flood and obstruction lights.
Communications:	Telephone, telegraph and airport radio station (WMDU).
Service Facilities:	Complete facilities.

(2) Alternate Airports.

Mobile, Ala.
(for New Orleans)

Description:	Bates Field, municipal; 4 miles S. of City; altitude 27′; 195 acres.
Runways:	Two concrete runways, 2400′ NW/SE, 3200′ NE/SW, each 100′ in width.
Obstructions:	Trees SE.
Markings:	MOBILE on hangar.
Lighting:	Beacon, boundary, flood, obstruction lights.
Communications:	Telephone.
Service Facilities:	Gas, Oil, Hangar and Shop.

Bates Field is being considerably improved at present and, when the new Municipal Airport in Mobile has been completed, Bates Field will be used exclusively by the Army. The new Municipal Airport in Mobile will acquire the name of Bates Field, and this new airport will be considerably larger and have better facilities than the above airport.

West Palm Beach, Fla.
(for Tampa and Miami)

Description:	Morrison Field (County); 4 miles S.W. of center of City; altitude 16′.
Runways:	Four paved runways 3000′ by 100′ N/S, E/W, NE/SW and NW/SE.
Obstructions:	Power line to S. and N.
Markings:	Day markings, standard; name on hangar.
Lighting:	Lighting beacon; boundary, approach and obstruction lights; lighted wind indicator.

Communications: Telephone; telegraph; teletype.
Weather Reports: At field.
Service Facilities: Gas, oil; airplane storage.

Pt. Borinquen, Puerto Rico
(For San Juan)
Description: U. S. Army Field, 18° 30′ N., 67° 8′ W. Long.
Runways: N/S 7000′ by 200′; NE/SW 7000′ by 200′; additional runways under construction.
Lighting: Beacon, boundary, obstruction, flood lights.
Communications: Telephone.
Weather Reports: Telephone.

(3) Emergency Landing Fields.

Biloxi, Miss.
Description: Auxiliary; 2 miles W. of City; altitude 23′.
Runways: One paved runway available, 3000′ by 150′ NW/SE.
Obstructions: Trees W.; power line E.
Lighting: Beacon, boundary, range and obstruction lights.

Fontainebleu, Miss.
Description: CAA Intermediate Field, Site 8, New Orleans Atlanta Airway; 4 miles N. of City; altitude 11′; 79 acres.
Runways: Two runways, 2800′ E/W; 2650′ NW/SE.
Obstructions: Pole line to W.; trees to S.
Markings: Shed marked 8-NO-A.
Lighting: Beacon, boundary, approach and obstruction lights.

Pensacola, Fla.

Description	Municipal; 4 miles N.N.E. of City; altitude 110′; 500 acres.
Runways:	3000′ N/S; 3500′ E/W; 3000′ NW/SE, all 100′ in width (asphalt).
Markings:	PENSACOLA on hangar roof.
Lighting:	Beacon, boundary and obstruction lights. Lighted wind cone.
Service Facilities:	Gas and oil.

Panama City, Fla.

Description:	Municipal; 5 miles N.W of City; sea level.
Runways:	Three landing strips, 1900′ NW/SE; 2300′ NE/SW both 200′ wide; 3000′ by 300′ N/S.
Markings:	PANAMA CITY on hangar.

Apalachicola, Fla.

Description:	Auxiliary; 1½ miles S.W of City; altitude 6′; 160 acress.
Runways:	Two runways, 2300′ N/S; 2600′ E/W, each 300′ wide.
Obstructions:	Pines 25′ high to N., S., E. and W.

Tallahassee, Fla.

Description:	Dale Mabry Field, municipal; 3 miles W. of City; altitude 64′.
Runways:	Two paved, 2500′ by 100′ N/S; 4000′ by 100′ NW/SE; width paved; 3400′ by 200′ E/W, sand and sod.
Obstructions:	Pole line N.E., S. and W.; trees E., S.E. and W.
Communications:	Telephone; telegraph.
Weather Reports:	At field.
Service Facilities:	Gas, oil, storage, repairs; day-night.

Cross City, Fla.

Description: Auxiliary; 1 mile E. of City; altitude 90′.
Runways: Two runways, 2600′ NW/SE and 2300′ NE/SW, each 400′ wide.
Obstructions: Pole line 30′ high to SW; trees surround field.
Markings: Wind indicator and boundary cones.

Dunellon, Fla.

Description: Auxiliary; 4 miles W. of City.
Runways: Two landing strips; 2400′ E/W; 2000′ N/S, both 400′ wide.

Ocala, Fla.

Description: Taylor Field, municipal; 1 mile S.W. of City; altitude 80′.
Runways: 2100′ NW/SE; 4400′ NE/SW; two paved runways 3900′ NE/SW and 2600′ NW/-SE, each 100′ wide.
Obstructions: Trees; pole line S.
Lighting: Beacon, boundary and obstruction lights.
Service Facilities: Day service.

Lakeland, Fla.

Description: Municipal; 2⅛ miles N of City; altitude 159′.
Runways: 2475′ by 100′; 3150′ by 100′ and 3500′ by by 150′.
Markings: WELCOME, LAKELAND on hangar; LAKELAND embedded in field.

Avon Park, Fla.

Description: Municipal; 1½ miles W. of City; altitude 105′.
Runways: Two runways, 3500′ NW/SE; 3200′ NE/-SW, each 400′ in width.
Service Facilities: Day service.

Okeechobee, Fla.

Description:	Conners Field, auxiliary; 1½ miles N.W. of City; altitude 19′; 180 acres.
Runways:	Three runways; 3100′ NW/SE; 2100′ N/S; 2350′ NE/SW, each 400′ wide.
Obstructions:	Pole line to S.; trees E.; railroad W.
Markings:	Day marked.

Belle Glade, Fla.

Description:	Municipal; 1½ miles N. of City.
Runways:	Two landing strips, 2400′ N/S; 2600′ E/W, each 400′ wide.
Service Facilities:	Fuel.

Habana, Cuba.

Description:	Rancho Boyeros, commercial; approximately 8 miles S. of Habana; altitude 300′.
Runways:	Landing field 2500′ by 2500′; sod, level.
Obstructions:	High tension lines 30′ high along railroad on E. side of field; buildings in S.E. corner of field.
Markings:	White circle; wind indicator on hangar.
Lighting:	Revolving beacon; obstruction lights.
Communications:	Telephone; telegraph.
Weather Reports:	Available.
Service Facilities:	Aviation gasoline and oil; repairs; hangar.

Cienfuegos, Cuba.

Description:	Jaime Gonzales Airport; municipal emergency landing field, E. of railroad; 1½ miles N.E. of center of City; altitude 50′.
Runways:	Two landing strips, N/S 3000′ by 210′; NE/SW 2700′ by 210′.
Obstructions:	Palm grove to N.E.
Markings:	Wind cone.

Ciego de Avila, Cuba.

Description: Emergency landing field, 1½ miles N.W. of City.

Runways: Two runways at right angles extending N/S 2460′ by 328′ and E/W 2624′ by 328′. Sod surface.

Obstructions: Fence around field; telephone line to N.E.

Markings: Both runways clearly outlined.

Camaguey, Cuba.

Description: General Ignacio Agramonte Airport; commercial; 4 miles N.E of City, S.E of railroad; altitude 345′.

Runways: Rectangular field, approximately 3000′ NE/SW by 3000′ NW/SE; clay and sod.

Obstructions: White steel tank 75′ high opposite field; pole line and railroad N.W. side of field.

Markings: Wind cone.

Weather Reports: At field.

Service Facilities: Aviation gasoline and oil.

Guantanamo, Cuba.

Description: Teniente Morlote; commercial; east bank of Guaso River; ¾ mile N.N.E. of City; altitude 75′; L-shaped.

Runways: N/S 2300′ by 800′; sod.

Obstructions: Concrete chimney 75′ high N.E.

Markings: Demolished sugar mill ¼ mile N.E.; wind cone in S.E. corner.

Service Facilities: Aviation gasoline (73 octane) and oil.

Baracoa, Cuba.

Description: Emergency landing field; 5 miles S.S.E. of City, adjacent to the river; altitude 100′.

Runways: Cross-runways extending N/S approximately 2461′ by 328′, and E/W 3280′ by 328′; gravel surface.

Anse-a-Pitre, Haiti.

Description: Emergency landing field; 1½ miles N. of City; altitude 50′.

Runways: 2400′ by 60′, but probably wider; level soil with underbrush up to 1½′ high.

Obstructions: Railroad spur at north end of field; low trees around edge of field; wooden mast for wind sock to S.E.; low hills to N.W.

Port-au-Prince, Haiti.

Description: Bowen Field; commercial; 1 mile N. of City, eastern side of highway; altitude 30′.

Runways: NE/SW 1850′; NW/SE 2200′; sod surface.

Obstructions: Sugar mill with 185′ stack on opposite side of highway, close northward of field; radio towers 400′ high, ¾ mile S.E.; pole line along S.W. and N.W. sides.

Markings: Wind cone on terminal building to S.E.; roof of terminal building painted orange.

Communications: Telephone; radio station (HHP).

Service Facilities: Aviation gasoline and oil in drums by arrangement; emergency repairs; no spare parts; hangars.

Ciudad Trujillo, Dominican Republic.

Description: Military field, located 1 mile W. of Ciudad Trujillo.

Runways: N.S. 2400′ by 200′; E/W 2700′ by 400′; turf runways, otherwise rough.

Service Facilities: Aviation gasoline (87 octane) and oil; two hangars.

61 EXHIBIT E.

Air Navigation Facilities.

New Orleans, Louisiana

The Applicant proposes to install at New Orleans a radio telephone and telegraph station which will provide a communication and navigational service for its aircraft and a point to point service for the exchange of traffic with its ground stations.

The radio range stations of the Civil Aeronautics Authority located at New Orleans (WWAG) will be used as a navigational aid. The following broadcast stations located in the New Orleans area will also be used for this purpose:

WWL	850 Kcs.	10 Kws.
WDSU	1250 Kcs.	1 Kw.
WBNO	1420 Kcs.	.25 Kws.

Coastal station WNU will be used as required for both communication and navigational service. This station, operating on intermediate and high frequencies and at .75, 1.2 and 5 Kws., provides 24-hour public correspondence service.

The airport control station at the New Orleans airport will be used by the Applicant's aircraft within the local area of the airport.

Tampa, Florida

The Applicant proposes to install at Tampa a radio telephone and telegraph station which will provide a communication and navigational service for its aircraft and a point to point service for the exchange of traffic with its other ground station.

The radio range station of the Civil Aeronautics Authority located at Tampa (WDZW) will be used as a navigational aid. Broadcast station WDAE, located at Tampa and operating at 1210 Kcs. on 1 Kw. at night and 5 Kws. during the day, will also be used as a navigational aid.

Coastal station WPD, which is open to public correspondence from 11:00 to 23:00 will be used as required by the aircraft of the Applicant for both communication and navigational purposes. This station operates at intermediate and high frequency channels to 8640 Kcs. on .5 Kw.

Miami, Florida

The Applicant proposes to use the existing radio telephone and telegraph station of the Civil Aeronautics Authority at the Miami airport to provide communication and navigation service for its aircraft. Point to point service for the exchange of traffic with the Applicant's own radio and telegraph station at Tampa will be provided by teletype.

Radio range station WWAF, 272 Kcs. (MM), will be used as a navigational aid. The following broadcast stations will also be used for this purpose:

WIOD	610 Kcs.	1 Kw.
WMBF	560 Kcs.	1 Kw.

San Juan, Puerto Rico

The Applicant proposes to install at San Juan a radio telephone and telegraph station which will provide a communication and navigational service for its aircraft and a point to point service for the exchange of traffic with its other ground stations.

There are two commercial coastal stations at San Juan which provide a public correspondence service, and the aircraft of the Applicant will use these stations as necessary for both communication and navigational purposes. Station NAU, which provides a 24-hour service, operates at 355, 464 and 500 Kcs. on 2 Kws. Station WCT operates on irregular hours at 2350 Kcs. on 4 Kws.

Other facilities in the San Juan area which will be used for navigational purposes by the aircraft of the Applicant include two broadcast stations (WKAQ and WNEL), a marine beacon, and a navigational service provided by United States Coast Guard cutter Unalga which is usually at San Juan. Station WKAQ operates at 1250 Kcs. on 1 Kw. Station WNEL operates at 1290 Kcs. on 1 Kw. at night and 2.5 Kws. during the day.

On the Gulf Coast and on the east coast of Florida there are various coastal stations, broadcast stations, radio range stations, marine radio beacon stations and marine direction-finding stations which the aircraft of the Applicant would use as enroute aids to navigation. Throughout Cuba, Haiti, the Dominican Republic and Puerto Rico there are numerous coastal stations and broadcast stations which will also be used for enroute navigational aids by the aircraft of the Applicant. The vessels of Waterman Steamship Corporation which operate constantly between New Orleans, Tampa and San Juan will also provide communication and directional facilities to the aircraft of the Applicant.

UNITED STATES

Gulf of Mexico

BAHAMA ISLANDS

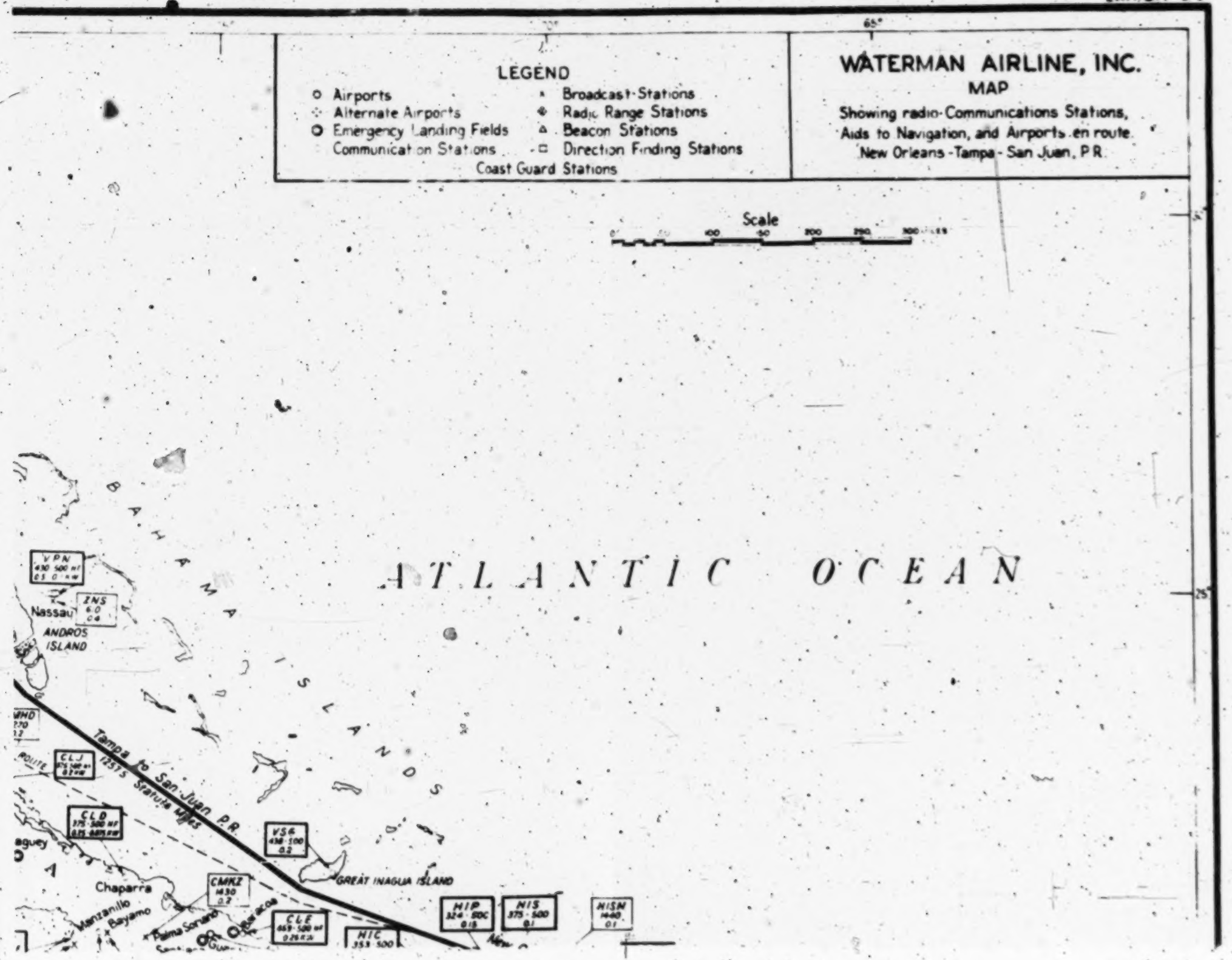
New Orleans to Tampa 483 Statute Miles

Tampa to San Juan P.R. 1257.5 Statute Miles

Waterman Steamship Corporation - Steamer Route

Savannah
Jacksonville
St Augustine
Gainesville
Cross City
Dunnellon
Ocala
Melbourne
Orlando
Lakeland
Tampa
Clearwater
Okeechobee
West Palm Beach
Lake Worth
Ft Lauderdale
Miami
Key West
Nassau
ANDROS ISLAND
Crestview
Tallahassee
Panama City
Apalachicola
Cape San Blas
Pensacola
Mobile
Fontanelle
Gulfport
Ship Island
New Orleans
Baton Rouge
Alexandria
Tylertown
Hattiesburg
Lake Charles
Lafayette
Port Arthur
Beaumont
Baytown
Galveston
Houston
Texas City
Sabine Pass
Southwest Pass
South Pass
Greta
Dry Tortugas
HAVANA
Pinar del Rio
Cienfuegos
Cardenas
Nueva Gerona
ISLE OF PINES
Trinidad
Caibarien
Sagua la Grande
Santa Clara
Ciego de Avila
Camaguey
Manzanillo
Bayamo
Chaparra
Palma Soriano
Santiago
Guantanamo
Baracoa
COZUMEL I.

EXHIBIT E-1


LEGEND
Airports
Alternate Airports
Emergency Landing Fields
Communication Stations
Broadcast Stations
Radio Range Stations
Beacon Stations
Direction Finding Stations
Coast Guard Stations
WATERMAN AIRLINE, INC.
MAP
Showing radio-Communications Stations, Aids to Navigation, and Airports en route
New Orleans - Tampa - San Juan, P.R.
Scale
65°
25°
BAHAMA ISLANDS
ATLANTIC OCEAN
Nassau
ANDROS ISLAND
Tampa to San Juan P.R.
1251 Statute Miles
GREAT INAGUA ISLAND
Chaparra
Manzanillo
Bayamo
Palma Soriano
Guantanamo
VPN
INS
CLJ
CLD
VSG
CMKZ
CLE
HIC
HIP
HIS
HISN

Gulf of Mexico

Lakeland
Tampa
Okeechobee
Avon Park
West Palm Beach
Lake Worth
Fort Lauderdale
Bell Gla
Miami
Dry Tortugas
Nassau
ANDROS ISLAND
BAHAMA ISLANDS
Tampa to San Juan P.R.
1237.5 Statute Miles
HAVANA
Cardenas
Sagua
Caibarien
Pinar del Rio
Cienfuegos
Santa Clara
Trinidad
Nueva Gerona
ISLE OF PINES
Cabo de Avila
Camagüey
Manzanillo
Bayamo
Santiago
Guantanamo
Ciuperra
Palma Soriano
Oriente
GREAT IN
Enseñada
PORT AU PRINCE
JAMAICA
Kingston
COZUMEL I
TURNEFFE I
BAY ISLANDS
BR HONDURAS
MEXICO
GUATEMALA
HONDURAS
Gulf of Tehuantepec
Caribbean

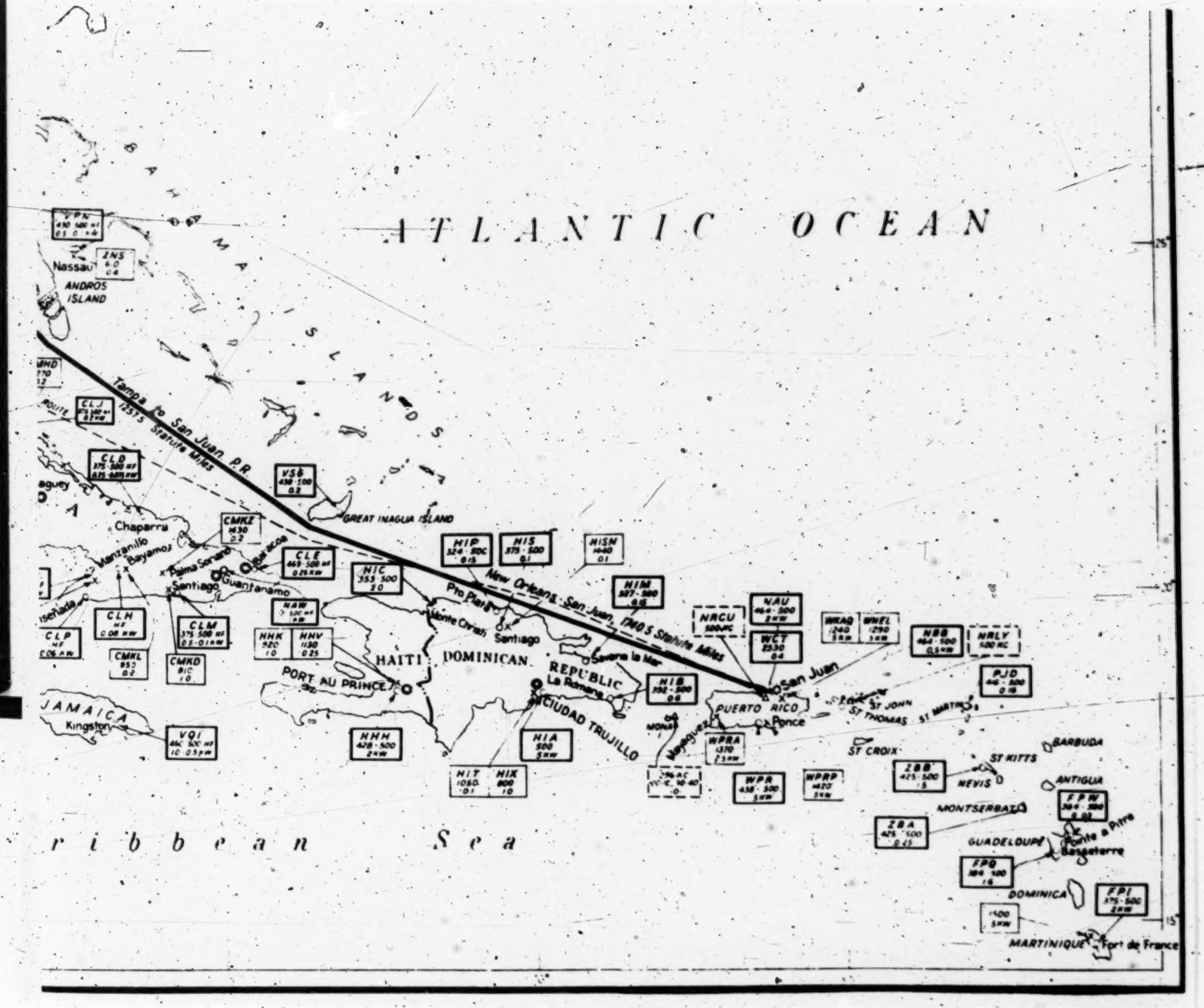

ATLANTIC OCEAN
Caribbean Sea
BAHAMA ISLANDS
Nassau
ANDROS ISLAND
Tampa to San Juan P.R.
1257.5 Statute Miles
New Orleans-San Juan, 1740.5 Statute Miles
GREAT INAGUA ISLAND
Chaparra
Manzanillo
Bayamo
Palma Soriano
Santiago
Guantanamo
Pro Plant
Monte Cristi
Santiago
Sevare la Mar
HAITI
DOMINICAN REPUBLIC
PORT AU PRINCE
La Romana
CIUDAD TRUJILLO
JAMAICA
Kingston
San Juan
PUERTO RICO
Ponce
Mayaguez
ST JOHN
ST THOMAS
ST MARTIN
ST CROIX
BARBUDA
ST KITTS
NEVIS
ANTIGUA
MONTSERRAT
GUADELOUPE
Pointe a Pitre
Basseterre
DOMINICA
MARTINIQUE
Fort de France

EXHIBIT F.

Proposed Schedules for Twin-Engine Planes.

	Days	Local Standard Time	G.M.T.
Outbound			
New Orleans	Lv. Mon.–Thurs.–Sat.	06.00 a.m.	12.00
Tampa	Ar. Mon.–Thurs.–Sat.	10.00 a.m.	15.00
	Lv. Mon.–Thurs.–Sat.	10.00 a.m.	15.00
Miami (stop for	Ar. Mon.–Thurs.–Sat.	11.10 a.m.	16.10
refueling only)	Lv. Mon.–Thurs.–Sat.	11.30 a.m.	16.30
San Juan	Ar. Mon.–Thurs.–Sat.	06.15 p.m.	22.15
Inbound			
San Juan	Lv. Tues.–Fri.–Sun.	07.30 a.m.	11.30
Miami (stop for	Ar. Tues.–Fri.–Sun.	11.50 a.m.	16.50
refueling only)	Lv. Tues.–Fri.–Sun.	12.10 p.m.	17.10
Tampa	Ar. Tues.–Fri.–Sun.	01.20 p.m.	18.20
	Lv. Tues.–Fri.–Sun.	01.50 p.m.	18.50
New Orleans	Ar. Tues.–Fri.–Sun.	03.20 p.m.	21.20

EXHIBIT F-1.

Proposed Schedules for Four-Engine Planes.

(1) Schedules Proposed to be Operated During the First Year of Operations.

	Days	Local Standard Time	G.M.T.
Outbound			
New Orleans	Lv. Mon.—Thurs.	06.30 a.m.	12.30
Tampa	Ar. Mon.—Thurs.	09.50 a.m.	14.50
	Lv. Mon.—Thurs.	10.20 a.m.	15.20
San Juan	Ar. Mon.—Thurs.	05.30 p.m.	21.30

Inbound			
San Juan	Lv. Tues.—Fri.	07.30 a.m.	11.30
Tampa	Ar. Tues.—Fri.	12.15 p.m.	17.50
	Lv. Tues.—Fri..	12.45 p.m.	17.45
New Orleans	Ar. Tues.—Fri.	02.05 p.m.	20.05

(2) Schedules Proposed to be Operated During the Second Year of Operations:

	Days	Local Standard Time	G.M.T.
Outbound			
New Orleans	Lv. Mon.—Thurs.—Sat.	06.30 a.m.	12.30
Tampa	Ar. Mon.—Thurs.—Sat.	09.50 a.m.	14.50
	Lv. Mon.—Thurs.—Sat.	10.20 a.m.	15.20
San Juan	Ar. Mon.—Thurs.—Sat.	05.30 p.m.	21.30
Inbound			
San Juan	Lv. Tues.—Fri.—Sun.	07.30 a.m.	11.30
Tampa	Ar. Tues.—Fri.—Sun.	12.15 p.m.	17.15
	Lv. Tues.—Fri.—Sun.	12.45 p.m.	17.45
New Orleans	Ar. Tues.—Fri.—Sun.	02.05 p.m.	20.05

EXHIBIT G.

Estimates of Traffic, Revenue and Expenses Twin-Engine Land Plane Operation.

	First Year 3 Round Trips per Week	Second Year 3 Round Trips per Week
Number of Revenue Passengers....	1,500	1,800
Pounds of Excess Baggage.....	7,500	9,000
Pounds of Express	60,000	75,000

	First Year 3 Round Trips per Week	Second Year 3 Round Trips per Week
Revenues		
Passenger	$162,000	$194,400
Excess Baggage	3,975	4,770
Express	31,800	39,750
Total	$197,775	$238,920
Expenses	540,000	525,000
Net Operating Loss before U. S. Mail Revenue and Interest	$342,225	$286,080

EXHIBIT G-1.

Estimates of Traffic, Revenue and Expenses Four-Engine Land Plane Operation.

	First Year 2 Round Trips per Week	Second Year 3 Round Trips per Week	Third Year 3 Round Trips per Week
Number of Revenue Passengers	2,400	3,600	4,500
Pounds of Excess Baggage	12,000	18,000	22,500
Pounds of Express	50,000	75,000	112,500
Revenues			
Passenger	$259,200	$388,800	$ 486,000
Excess Baggage	6,360	9,540	11,925
Express	26,500	39,750	59,625
Total	$292,060	$438,090	$ 557,550
Expenses	710,000	960,000	1,030,000
Net Operating Loss before U. S. Mail Revenue and Interest	$417,940	$521,910	$ 472,450

EXHIBIT H.

Waterman Airline, Inc.

Balance Sheet.

December 6, 1940.

Assets.

Cash in Bank			$50,000.00
Deferred Charges:			
Organization and Experimental Expense			25,808.29
Total			$75,808.29

Liabilities.

Accounts Payable:			
Waterman Steamship Corporation			$25,808.29
Capital Stock	*Authorized*	*Issued*	
Common	10,000	500	50,000.00
Total			$75,808.29

EXHIBIT I.

Waterman Steamship Corporation.

Balance Sheet—September 30, 1940.

Assets.

Current and Working Assets:		
Cash in Bank and On Hand—Operating A/C	$ 810,168.47	
Cash in Bank, Special Construction Fund	1,025,000.02	$1,835,168.49
Accounts Receivable:		
Domestic Shippers	$ 279,462.74	
Domestic and Foreign Agents	361,314.33	
Notes Receivable	102,914.00	
Marine Insurance Claims	93,234.98	
Gulf Shipbuilding Corp.	202,159.81	
Interest Accrued	825.70	
Inventories, Fuel Oil and Stores	141,172.94	
Containers, Slop Chest and Bar Account	15,294.37	
Prepaid and Unearned Insurance	55,010.35	
Cash Value of Life Insurance	2,838.45	
Readily Marketable Bonds	1,000.00	
Supplies in Warehouse	67,433.38	
Agency Vessels	5,792.25	1,328,453.30

Cash Deposits:			
Conferences	$ 1,300.00		
Bonds Deposited as Collateral	51,129.69		
Puerto Rican Conferences	15,000.00		
Puerto Rican Power & Light Co.	63.00	67,492.69	
Advances:			
Branch Offices and Employees	$ 9,083.44		
Crew Allotments	47,569.75		
Masters	73,361.67	130,014.86	
Total Current and Working Assets			$3,361,129.34
Notes Receivable Deferred			1,500.00
Investment in Stocks			302,611.66
Property Account—Mobile Oceanic Line:			
28 Vessels, Including Improvements	$5,114,555.36		
Less Depreciation	2,300,631.94	$2,813,923.42	
Office Furniture and Equipment		5,000.00	
Automobile, Less Depreciation		4,107.24	
Tools and Equipment, Less Depreciation		28,759.01	
Motor Boat, Less Depreciation		2,163.13	

Warehouse Property, Less Depreciation	2,790.44	
Boat House	1,635.61	
Lysistrata, Less Depreciation	46,830.77	
Stevedoring Equipment, Less Depreciation	1,355.50	2,906,565.12
Property Account—Puerto Rican Division:		
Stevedoring Equipment, Less Depreciation	$ 11,258.89	
Furniture and Equipment, Less Depreciation	349.11	
Automobile, Less Depreciation	2,025.24	13,633.24
Deferred Expense:		
Sundry Prepaid Expense—Mobile Oceanic Line	$ 16,143.56	
Purchase Good Will a/c New York & Porto Rico Steamship Company	29,100.00	
Sundry Prepaid Expense—Puerto Rican Div.	1,465.56	46,709.12
Good Will		1.00
Total Assets		$6,632,149.48

Contingent Assets:
(Life Insurance in favor of Company $237,161.55)

EXHIBIT I.

Waterman Steamship Corporation.

Balance Sheet—September 30, 1940.

Liabilities.

Current Liabilities:		
Advance by Shippers and Prepaid Beyond	$ 7,171.89	
Unclaimed Wages	2,280.00	
Miscellaneous Accounts Payable	603.87	$ 10,055.76
Accruals:		
Interest	$ 3,657.96	
Reserve for State and Local Taxes	31,950.50	
Reserve for Old Age Benefit	14,226.95	
Reserve for Unemployment Tax	11,127.09	
Reserve for W. C. and P. L. Insurance	8,608.44	
Reserve for Strike Expense	18,624.99	
Reserve for Vacation Wages	20,718.13	
Reserve for Income Tax 1940	788,958.67	897,872.73

Current Portion of Mortgage Notes Due:			
Commercial National Bank and Trust Company of New York	$100,000.00		
Merchants National Bank of Mobile	125,000.00		
McCormick Steamship Company—due 4/1/41	110,000.00	335,000.00	
Total Current Liabilities			$1,242,928.49
Deferred Portion Mortgage Notes Due:			
Commercial National Bank and Trust Company of New York			25,000.00
Appropriated Surplus:			
Reserve for P. & I. Franchise		$ 60,895.99	
Reserve for Idle Status		244,969.90	
Reserve for Contingencies		50,000.00	355,865.89
Revenue on Incompleted Voyages (MOL)	$1,767,068.75		
Less Expense, Incompleted Voyages	787,925.05	$ 979,143.70	
Revenue on Incompleted Voyages (PRD)	$ 4,036.86		
Less Expense, Incompleted Voyages	27,646.59	—23,609.73	955,533.97

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Net Worth:					
Capital Stock	*Authorized*	*Issued*			
Preferred	10,000	6,180½	$ 618,050.00		
Common	30,000	20,786	519,650.00	$1,137,700.00	
Undivided Profit			$2,862,501.13		
Paid-in Surplus			52,620.00	2,915,121.13	4,052,821.13
Total Liabilities					$6,632,149.48

81

Contingent Liabilities:
(Guaranty PASSCO Notes to Christenson S. S. Co. $16,666.70)

71 Orig.

Received Docket Section, Proceedings Division, June 26, June 16, 1:59 PM, '41, Economic Bureau, Civil Aeronautics Board.

Before the
Civil Aeronautics Board,
Washington, D. C.

AMENDMENT No. 1 TO THE APPLICATION OF WATERMAN AIRLINE, INC. FOR A PERMANENT CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER SECTION 401 OF THE CIVIL AERONAUTICS ACT OF 1938.

Docket No. 525.

Route and Service to be Covered.

Scheduled air transportation of persons and property (except mail) between the terminal point New Orleans, La., the intermediate point Tampa, Fla., and the terminal point San Juan, Puerto Rico, provided, however, the Applicant shall not be authorized to engage in air transportation locally between New Orleans, La., and Tampa, Fla.

Communications from the Board with respect to this application should be sent to the following:

E. A. Roberts, President,
Waterman Airline, Inc.,
Merchants National Bank Building,
Mobile, Ala.

and

Hubert A. Schneider,
815 Fifteenth Street, Northwest,
Washington, D. C.

Ack. 6-16-41.
R. T.

Waterman Airline, Inc. hereby amends the application filed with the Board on December 19, 1940, being Docket No. 525, in the following particulars:

1. Paragraph No. 3 of the original application is hereby amended to read as follows:

The Applicant requests a permanent certificate of public convenience and necessity authorizing it to engage in the scheduled transportation of persons and property (except mail) between the terminal points New Orleans, La. and San Juan, Puerto Rico, via the intermediate point Tampa, Fla., provided, however, the Applicant shall not be authorized to engage in scheduled transportation of local traffic of persons and property between New Orleans, La. and Tampa, Fla. The authorization which the Applicant requests with respect to Tampa, Fla. is merely for the purpose of receiving and discharging passengers and property (except mail) destsined to and arriving from San Juan, Puerto Rico.

2. Paragraph No. 13 of the original application is hereby amended to read as follows:

The Applicant proposes to inaugurate service over the route applied for with two 21-passenger Douglas DC-3 airplanes. It is estimated that the cost of each such

plane will be approximately $125,000 fully equipped. Applicant proposes eventually to use four-engine land planes over the route applied for when equipment of that nature becomes available. The type of four-engine plane which the Applicant will use has not yet been definitely elected, but it is expected that it will have seating capacity of approximately thirty (30) persons.

3. Paragraph 14 of the original application is hereby amended to read as follows:

The Applicant proposes to inaugurate service over the proposed route as follows:

Trip 1		Trip 2
Lv. 6:00 AM CST	New Orleans	Ar. 4:27 PM CST
Ar. 9:51 AM EST	Tampa	Lv. 2:36 PM EST
Lv. 10:11 AM EST	Tampa	Ar. 2:16 PM EST
Ar. 6:27 PM PRT	San Juan	Lv. 8:00 AM PRT

4. Paragraph 16 of the original application is hereby amended to read as follows:

The Applicant will submit at the hearing to be held in connection with this aplication or earlier if desired by the Board, full and complete estimates as to the revenues and expenses to be incurred by the Applicant for each of the first two years of operation with twin-engine planes.

5. Paragraph 18 of the original application is hereby amended to read as follows:

The Applicant was incorporated under the laws of the State of Delaware on December 3, 1940. Its parent corporation, the Steamship Corporation, has, however, been

engaged in the operation of a steamship service since 1919. The Steamship Corporation and its wholly-owned subsidiaries at present operate a fleet of vessels in the commerce of the United States.

E. A. Roberts, President and a director of the Applicant, has been connected with various transportation companies as an executive officer for over twenty years. He is now President and a director of the Steamship Corporation, Pan Atlantic Steamship Corporation, Waterman Steamship Agency, Ltd., Gulf Shipbuilding Corporation and other companies affiliated with the Steamship Corporation. Such companies have all proved financially successful and their operations have steadily expanded under the management of Mr. Roberts.

C. B. Waterman, Vice President (Traffic) and a director of the Applicant, is Vice President and a director of the Steamship Corporation. He has been closely connected with the Gulf of Mexico-Puerto Rican traffic of the Steamship Corporation for several years and is at the present time traffic manager of that service for the Steamship Corporation. Mr. Waterman is generally familiar with aeronautical matters, holding a private pilot's license and flying his own plane.

Roy Keeley, Vice President and General Manager and a director of the Applicant, has devoted his entire time to commercial aviation since the Spring of 1919 in various capacities as designer and engineer, test pilot, commercial pilot, air line transport captain and air line operations manager, as well as positions in supervisory capacity with the U. S. Department of Commerce, U. S. Civil Aeronautics Authority and U. S. Civil Aeronautics Board. In 1919 Mr. Keeley conducted research work in acetylene welding and its application to aircraft use and

applied this development to air craft and its accessories which he designed, supervised construction of, and tested. During this period he served as vice-president and chief engineer with Keeley-King Aircraft Corporation which company pioneered aviation throughout the New England states.

In 1931 and 1932, Mr. Keeley assisted as pilot with blind landing experiments conducted at College Park, Maryland by the U. S. Department of Commerce and in 1934 was assigned the duty of conducting an inspection and compilation of a detailed study of air line operations in Mexico, Central America, South America, and the West Indies. In 1940 Mr. Keeley resigned his position with the Civil Aeronautics Board and joined the staff of a commercial air line as consultant and also served as captain in regular schedules. On January 15, 1941, Mr. Keeley joined the staff of the Applicant and since that time has conducted a study of their operations and made survey flights of the proposed route, New Orleans to San Juan, and its facilities.

H. C. Slaton, Secretary-Treasurer and a director of the Applicant is Secretary-Treasurer and a director of the Steamship Corporation and has been in charge of financial and accounting matters relating to ocean transportation for over twenty years.

E. Emile Rackle, Communications Superintendent of the Applicant has been engaged in commercial radio communications activities since 1927. During this period he has been employed as a radio operator by an aviation company and a number of steamship companies. He acquired experience in the operation and maintenance of modern tube equipment, low, intermediate and high frequencies, and radio direction finders of both aircraft and ground stations, and participated in various phases of

radio communication with stations of numerous foreign countries. Mr. Rackle has also served at the coastal station of the Mackay Radio & Telegraph Company at Southampton, Long Island. He has been in charge of the communications system of the Steamship Corporation during the past three years.

6. Applicant has caused a notice of its intention to file this Amendment No. 1 to its original application to be served upon each person named in the most recent issued list of scheduled air carriers by mailing a copy thereof on June 25, 1941, by registered mail, postage prepaid. A copy of this notice is attached hereto.

Respectfully submitted,

WATERMAN AIRLINE, INC.,
By E. A. ROBERTS,
(E. A. Roberts)
President.
ROY KEELEY,
(Roy Keeley)
Vice President and General Manager.
H. C. SLATON,
(H. C. Slaton)
Secretary-Treasurer.

76 NOTICE OF INTENTION.

You And Each Of You Are Hereby Notified of the intention of Waterman Airline, Inc. to file with the Civil Aeronautics Board in Washington, D. C., promptly after the date hereof, an amendment to its original application filed with the Board on December 19, 1940, and bearing Docket No. 525. The general purpose of this amendment is to eliminate from the original application any request for authorization to engage in air transportation of mail and to limit the air transportation to be

authorized at the intermediate point Tampa, Fla. to persons and property (except mail) originating at Tampa and destined to San Juan, Puerto Rico, or originating at San Juan, Puerto Rico and destined to Tampa, Fla.

WATERMAN AIRLINE, INC.,
By E. A. ROBERTS,
(E. A. Roberts)
President.

77 VERIFICATION.

State of Alabama,
County of Mobile, ss.

E. A. Roberts, being duly sworn, deposes and says: That he is President of Waterman Airline, Inc., Applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing amendment and the attached exhibit; that he intends and desires that in granting or denying the rights and privileges applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that to the best of his information and belief every statement contained in the amendment is true and no such statement is misleading; and that, in his opinion, the amendment does not omit to state facts known to him which would be deemed by the Board to be of importance to it in reaching its determination in connection therewith.

E. A. ROBERTS,
(E. A. Roberts)
President.

Subscribed in my presence, and sworn to before me, by the affiant above-named, this 24 day of June, 1941.

EUNICE MURRAY,
Notary Public.

My Commission Expires Nov. 7, 1943.

78 VERIFICATION.

State of Alabama,
County of Mobile, ss.

H. C. Slaton, being duly sworn deposes and says: That he is Secretary-Treasurer of Waterman Airline, Inc., Applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing amendment and the attached exhibit; that he intends and desires that in granting or denying the rights and privileges applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that to the best of his information and belief every statement contained in the amendment is true and no such statement is misleading; and that, in his opinion, the amendment does not omit to state facts known to him which would be deemed by the Board to be of importance to it in reaching its determination in connection therewith.

H. C. SLATON,
(H. C. Slaton)
Secretary-Treasurer.

Subscribed in my presence, and sworn to before me, by the affiant above-named, this 24 day of June, 1941.

MORGAN T. SWIFT,
Notary Public.

My Commission Expires February 24, 1945.

79 VERIFICATION.

State of Alabama,
County of Mobile, ss.

Roy Keeley, being duly sworn, deposes and says: That he is Vice President and General Manager of Waterman Airline, Inc., Applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing amendment and the attached exhibit; that he intends and desires that in granting or denying the rights and privileges applied for, the Board shall place full and compete reliance on the accuracy of each and every statement therein contained; that to the best of his information and belief every statement contained in the amendment is true and no such statement is misleading; and that, in his opinion, the amendment does not omit to state facts known to him which would be deemed by the Board to be of importance to it in reaching its determination in connection therewith.

ROY KEELEY,
(Roy Keeley)
Vice President and General Manager.

Subscribed in my presence, and sworn to before me, by the affiant above-named, this 24 day of June, 1941.

MORGAN T. SWIFT,
Notary Public.

My Commission Expires February 24, 1945.

(Stamp Illegible.)

Before the
Civil Aeronautics Board,
Washington, D. C.

AMENDMENT No. 2 TO THE APPLICATION OF WATERMAN AIRLINE, INC. FOR A PERMANENT CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER SECTION 401 OF THE CIVIL AERONAUTICS ACT OF 1938.

Docket No. 525.

Route and Service to be Covered.

Scheduled air transportation of persons and property (except mail) between the terminal points New Orleans, Louisiana and San Juan, Puerto Rico, via such intermediate point or points as the Board designates or to such other terminus points in the United States beyond New Orleans, Louisiana, or beyond the terminus point San Juan as the Board designates in its Certificate to the Applicant.

Communications from the Board with respect to this application should be addressed to the following:

E. A. Roberts, President,
Waterman Airline, Inc.,
Merchants National Bank Building,
Mobile, Alabama.

Roy Keeley, Vice President,
Waterman Airline, Inc.,
Merchants National Bank Building,
Mobile, Alabama.

Bon Geaslin,
520 Investment Building,
Washington, D. C.

September 24, 1943.

Pursuant to the Board's Memoranda dated September 8, 1943, Waterman Airline, Inc. hereby amends its application filed with the Board on December 19, 1940 being Docket No. 525, and its amendment No. 1 dated June 24, 1941, in the following particulars:

1. Paragraph No. 3 of Amendment No. 1 to its original application is hereby amended to read as follows:

The Applicant requests a permanent certificate of public convenience and necessity authorizing it to engage in scheduled transportation of persons and property (except mail) between the terminal points New Orleans, La. and San Juan, Puerto Rico, via such intermediate point or points as the Board designates, or to such other terminus in the United States beyond New Orleans, Louisiana or beyond the terminus point San Juan, Puerto Rico as the Board designates in its certificate to the Applicant.

2. Applicant has caused a notice of its intention to file this amendment No. 2 to its application to be served upon each person named in the most recent issued list of scheduled air carriers by mailing a copy thereof on September 17, 1943, postage prepaid. A copy of this notice is attached hereto.

Respectfully submitted,

WATERMAN AIRLINE, INC.,

By E. A. ROBERTS,
(E. A. Roberts)
President.

By ROY KEELEY,
(Roy Keeley)
Vice President.

By H. C. SLATON,
(H. C. Slaton)
Secretary-Treasurer.

82 VERIFICATION.

State of Alabama,
County of Mobile, ss.

E. A. Roberts, being duly sworn, deposes and says: That he is President of Waterman Airline, Inc., applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing amendment; that he intends and desires that in granting or denying the rights and privileges applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that to the best of his information and belief every statement contained in the amendment is true and no such statement is misleading; and that, in his opinion, the amendment does not omit to state facts known to him which would be deemed by the Board to be of importance to it in reaching its determination in connection therewith.

E. A. ROBERTS,
(E. A. Roberts)
President.

Subscribed in my presence and sworn to before me, by the affiant above-named this 23 day of Sept., 1943.

EUNICE MURRAY,
Notary Public.

My Commission expires: Nov. 7, 1943.

83 VERIFICATION.

State of Alabama,
County of Mobile, ss.

H. C. Slaton, being duly sworn, deposes and says: That he is Secretary-Treasurer of Waterman Airline, Inc., Ap-

plicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing amendment; that he intends and desires that in granting or denying the rights and privileges applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that to the best of his information and belief every statement contained in the amendment is true and no such statement is misleading; and that, in his opinion, the amendment does not omit to state facts known to him which would be deemed by the Board to be of importance to it in reaching its determination in connection therewith.

H. C. SLATON,
(H. C. Slaton)
Secretary-Treasurer.

Subscribed in my presence and sworn to before me, by the Affiant above-named, this 23 day of Sept., 1943.

EUNICE MURRAY,
Notary Public.

My Commission Expires: Nov. 7, 1943.

84 VERIFICATION

State of Alabama,
County of Mobile, ss.

Roy Keeley, being duly sworn, deposes and says: That he is Vice President and General Manager of Waterman Airline, Inc., Applicant in the above-entitled application; that he has read and is familiar with the contents of the foregoing amendment; that he intends and desires that in granting or denying the rights and privileges applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein con-

tained; that to the best of his information and belief every statement contained in the amendment is true and no such statement is misleading; and that, in his opinion, the amendment does not omit to state facts known to him which would be deemed by the Board to be of importance to it in reaching its determination in connection therewith.

ROY KEELEY,
(Roy Keeley)
Vice President.

Subscribed in my presence and sworn to before me, by the affiant above-named, this 23 day of Sept., 1943.

EUNICE MURRAY,
Notary Public.

My Commission expires: Nov. 7, 1943.

Original.

Received Docket Section, Proceedings Division, Feb. 9, 4:05 PM, '44, Economic Bureau, Civil Aeronautics Board.

Civil Aeronautics Board,
Washington, D. C.

APPLICATION (AS AMENDED) OF #3 WATERMAN STEAMSHIP CORPORATION FOR A PERMANENT CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UNDER SECTION 401 OF THE CIVIL AERONAUTICS ACT OF 1938, AS AMENDED.

Docket No. 525.

Route and Service to be Covered.

Scheduled air transportation of persons and property (except mail), between the terminal points New Orleans,

Louisiana and San Juan, Puerto Rico, via Tampa, Florida, and such intermediate point or points as the Board designates or to such other terminus points in the United States beyond New Orleans, Louisiana, or beyond the terminus point San Juan as the Board designates in its Certificate to the Applicant.

Communications from the Board with respect to this Application should be sent to the following:

E. A. Roberts, President,
Waterman Steamship Corporation,
Merchants National Bank Building,
Mobile, Alabama.

Bon Geaslin,
520 Investment Building,
Washington, D. C.

Roy Keeley, Manager,
Airline Division,
Waterman Steamship Corporation,
Merchants National Bank Building,
Mobile, Alabama.

Filed: ....., 1944.

Civil Aeronautics Board,

Washington, D. C.

Amended Application of Waterman Airline, Inc. to Substitute Name of Waterman Steamship Corporation, as Applicant for a Permanent Certificate of Public Convenience and Necessity under Section 401 of the Civil Aeronautics Act of 1938 as Amended.

Waterman Airline, Inc. hereby amends the application to substitute the name of Waterman Steamship Corpo-

ration as the applicant and in the following other respects:

1. The full name and address of the Applicant is Waterman Steamship Corporation, Merchants National Bank Building, Mobile, Alabama. The Applicant is a corporation duly organized and existing under the laws of the State of Alabama.

2. The Applicant is a citizen of the United States, as defined by Section 1 (13) of the Civil Aeronautics Act of 1938. The President of the Applicant is a citizen of the United States. All members of its Board of Directors and all its managing officers are citizens of the United States. The Applicant is a corporation duly organized and existing under the laws of the State of Alabama. The Applicant states that one hundred per cent of the voting interest of the Corporation is owned by citizens of the United States and is prepared to present evidence showing that in excess of seventy-five per cent of the voting interest is so owned.

3. The Applicant requests a permanent certificate of public convenience and necessity authorizing it to engage in the scheduled transportation of persons and property (except mail) between the terminal points New Orleans, Louisiana and San Juan, Puerto Rico, via Tampa, Florida and such intermediate point or points as the Board designates or to such other terminus points in the United States beyond New Orleans, Louisiana, or beyond the terminus point San Juan, Puerto Rico as the Board designates in its certificates.

4. Applicant proposes an integrated air carriers-steamship service which will promote the public interest by

enabling Applicant to use aircraft to public advantage in its steamship operations and will not restrain competition, thereby enabling Applicant to improve its facilities and services and to keep abreast of modern means of transportation.

5. Applicant receives no operating subsidy from the Government for operation of its steamship service.

Wherefore, The Applicant Prays:

That the Board issue to Applicant, Waterman Steamship Corporation, a permanent certificate of public convenience and necessity authorizing Applicant to engage in the scheduled transportation of persons and property between the terminal points New Orleans, Louisiana, and San Juan, Puerto Rico, and the intermediate point, Tampa, Florida.

Respectfully submitted,
WATERMAN STEAMSHIP CORPORATION,
By E. A. ROBERTS,
(E. A. Roberts)
President.

88 VERIFICATION.

State of Alabama,
County of Mobile, ss.

E. A. Roberts, being duly sworn, deposes and says: That he is President of Waterman Steamship Corporation, Applicant in the above entitled application; that he has read and is familiar with the contents of the foregoing amendment; that he intends and desires that in

granting or denying the rights and privileges applied for, the Board shall place full and complete reliance on the accuracy of each and every statement therein contained; that to the best of his information and belief every statement contained in the amendment is true and no such statement is misleading.

E. A. ROBERTS,
(E. A. Roberts)
President.

Subscribed in my presence; and sworn to before me by the affiant above named this 3rd day of February 1944.

EUNICE MURRAY,
Notary Public.

My Commission Expires: Oct. 31, 1947.

Received Docket Section, Proceedings Division, May 6, 11:17 AM, '46, Economic Bureau, Civil Aeronautics Board.

89

Before the
Civil Aeronautics Board.

Application of Waterman Steamship Corporation, for a permanent certificate of public convenience and necessity under Section 401, subsection (d) of the Civil Aeronautics Act of 1938.

Docket No. 525.

The Latin American Cases in the matter of applications for certificates of public convenience and necessity under Section 401 of the Civil Aeronautics Act of 1938.

Docket No. 525 et al.

MOTION OF WATERMAN STEAMSHIP CORPORATION TO REOPEN THE PROCEEDING TO RECEIVE FURTHER EVIDENCE AND FOR REARGUMENT.

The applicant, Waterman Steamship Corporation, by its attorney, respectfully moves that the Board reopen the proceeding in Docket No. 525, to receive and consider proof upon its application, of changed conditions, facts and events which have transpired since this case was submitted, and for a reargument herein. In support thereof, applicant respectfully represents:

(1) That the applicant filed its application for a certificate of public convenience and necessity authorizing it to engage in the scheduled transportation of persons and property by air between the terminal points of New Orleans, Louisiana, and San Juan, Puerto Rico, via the

intermediate point of Tampa, Florida, almost five and one-half years ago, to-wit: on December 19, 1940.

(2) That on December 6, 1943, by order of the Board, Waterman's application was consolidated for hearing with all applications for routes between the United States, Mexico, Central and South America and the Caribbean area; that hearings before the Examiners in the consolidated proceeding were held in September and October, 1944, almost five years subsequent to the date such application was filed; that briefs were filed before the Examiners on December 14, 1944; that briefs were filed before the Board on the Examiners' Report on April 23, 1945, and the case was argued before the Board and submitted to it for decision about May 1, 1945.

(3) That the Board has not issued or denied any certificate of public convenience and necessity in the above-entitled proceeding, nor has there been published any decision of the Board therein or approval thereof by the President, as required in Section 801 of the Civil Aeronautics Act, 1938, as amended.

(4) That the statistics and economic data furnished to all applicants by the Economic Bureau, Research and Analysis Division of the Civil Aeronautics Board relating to pre-war traffic at the time of their preparation were admittedly inadequate and incomplete, and the post-war projections of potential traffic and other economic data were purely hypothetical and speculative; that the applicants themselves at the time of the hearing could offer only theoretical and unsupported estimates of potential traffic and of conditions and factors with respect to future traffic and competition with foreign flag lines in the Caribbean area; that in the light of events which have transpired since the case was submitted to the

Board for decision, such statistics, forecasts of potential traffic, and other economic data, cannot form the basis of a proper decision of the Board on the question of public convenience and necessity.

(5) That at the time of the hearing, the United States was at war and applicants, by reason of security regulations and other prohibitions, were prevented from obtaining and introducing substantial and material evidence with respect to past and prospective operations of air transportation services in the Caribbean area.

(6) That at the time of the hearing, neither the applicants nor the United States Government had information upon which to base a projected air transportation pattern in the Caribbean area, as a result of which the Board has before it an incomplete and inadequate record of a highly speculative and hypothetical nature and not based upon facts as they exist today; that since the case was argued and submitted to the Board, there has been a cessation of hostilities, in which the United States was then engaged, and commercial air transportation has been resumed in the Caribbean area, and conditions with respect to possible competition and traffic conditions have materially changed.

(7) That because of the cessation of hostilities, the resumption of commercial air transportation and other conditions which have changed as a result of these factors, since the argument and submission of this case, a decision on the existing record would not be proper or valid in the light of existing facts and conditions, and might result in a flagrant violation of the principles of common justice to this applicant.

(8) That the record relating to the factors pertaining to the question of public convenience and necessity,

namely: (1) whether the proposed operation will provide a transportation service responsive to a public need; (2) whether this purpose can and will be served adequately by existing lines or carriers over said route; (3) whether it can be served by the applicant without impairing the operations of existing carriers, contrary to the public interest; (4) the effect of the proposed service upon the individual applicants, and (5) the cost of the proposed service to the Government as related to the benefit which will accrue to the public from the new service, closed, as it was, more than eighteen months ago, pertains to a different era and furnishes no adequate criterion of present requirements, and cannot be regarded as representative of conditions existing in May, 1946.

(9) That at the time of the hearing, because the United States was at war, this applicant was unable to show that it had available aircraft and other flight equipment, and trained flight and engineering personnel to inaugurate the proposed service, nor was it able to submit evidence as to when such equipment and personnel might be obtained, for the reason that all such equipment was being used by the government for war purposes, and all such personnel were engaged in the war effort;

(10) That this applicant can now prove and will prove if given the opportunity, that it owns adequate aircraft and other flight equipment, and that it has in its employ the flight, engineering, and other personnel adequate to inaugrate and maintain the proposed service; that applicant is informed, and believes that it can prove that there are at least 5,000 persons in Puerto Rico who have sought in recent months and are now seeking to obtain transportation to the United States and who have been unable to do so because no adequate service is available;

that applicant will prove, if given an opportunity to do so, that there are in the United States thousands of applicants for transportation to Puerto Rico who are now unable to obtain transportation because no adequate service is available; that because of war conditions existing at the time of the hearing on this application, this applicant was not in a position to submit proof of this nature.

(11) That at the hearing aforesaid, Pan American Airways, Inc., another applicant in this proceeding, contended that it contemplated the establishment and maintenance of an adequate service to and from Puerto Rico subsequent to the termination of the war.

(12) That Pan American Airways, Inc., since the inauguration of its Latin American services has received from the United States approximately $75,000,000 as air mail transportation in the Latin American area alone; that said payments were made pursuant to the policy of Congress, as declared in the Civil Aeronautics Act of 1938, to encourage and develop an air transportation system adapted to the present and future needs of the foreign and domestic commerce of the United States, as well as the postal service and the national defense, and the promotion of adequate, economic and efficient service at reasonable charges to the people of the areas specified in its certificates of public convenience and necessity.

(13) That applicant will show, if given an opportunity to do so, that notwithstanding the payments received from the United States by Pan American Airways, Inc. during this period as aforesaid, such company has not and is not now providing adequate, economical and efficient service at reasonable charges between Puerto Rico and Continental United States, and at the hear-

ing held upon this application conceded its inability to provide adequate and efficient air transportation service between such areas at reasonable charges, except under conditions specified by it, which conditions applicant will show are impossible of attainment, and were not made in good faith.

(14) That by reason of the government-supported monopoly enjoyed by Pan American Airways, Inc. during this period, the people of Puerto Rico and the people in that area of the United States served by the New Orleans gateway have been deprived of an adequate, economical and efficient air transportation service at a reasonable charge as contemplated by the statute, and said Pan American Airways, Inc. still fails and refuses to provide such adequate economical and efficient service at reasonable charges to the people in the areas involved.

(15) That Chicago & Southern Airlines, Inc., Delta Air Corporation, and National Airlines, Inc., pursuant to the policy of the Congress established by the Civil Aeronautics Act, 1938, have received from the United States, in airmail compensation the sum of approximately $3,000,000, $3,500,000 and $2,250,000, respectively, since the enactment of said Act, to enable them to provide adequate, economical and efficient transportation service at reasonable charges to the areas named in the certificates of public convenience and necessity issued to them respectively; that applicant will show, if given an opportunity to do so, that notwithstanding the receipt of such payments, neither of said air carriers have provided adequate, economical, and efficient transportation at reasonable charges over the routes or in the areas which they have been authorized to serve; that said air carriers are not now providing adequate, economical and

efficient air transportation at reasonable charges to such areas, and that they are not willing and able to do so, notwithstanding the lapse of time since the cessation of hostilities during which aircraft have been available for acquisition by said air carriers to provide such transportation; that in view of the fact that they have failed to carry out the provisions of their certificates of public convenience and necessity requiring them to provide adequate, economical and efficient service at reasonable charges over the routes designated in such, neither of them is fit, willing or able to provide the services between the United States and Puerto Rico required by the public convenience and necessity.

(16) That the applicant herein proposes and is prepared to operate an air transportation service over the route specified in its application herein without the aid of airmail compensation and without any cost to the government whatsoever, and applicant under the changed conditions is prepared to prove that such service is economically sound and is required by the public convenience and necessity.

(17) That upon the basis of the decision of the Supreme Court of the United States in *Atchison, Topeka & Santa Fe Railway Company v. United States*, 284 U. S. 260, applicant is entitled to have the record reopened for the introduction of the evidence of changed conditions specified herein; that the petition for reopening the record in that case was based, as is this motion, upon changed economic conditions demanding further considerations. There the Court stated:

"There can be no question as to the change in conditions upon which the new hearing was asked. Of that change we may take judicial notice. It is the outstand-

ing contemporary fact, dominating thought and action throughout the country.

* * * * * * *

"It is plain that a record which was closed in September, 1928—relating to rates on a major description of the traffic of the carriers in a vast territory—cannot be regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements.

* * * * * * *

"This is not the usual case of possible fluctuating conditions but of a changed economic level. And the prospect that a hearing may be long does not justify its denial if it is required by the essential demands of justice."

Wherefore, for the reasons stated, applicant moves the Board to reopen the record in this case for the receipt of further testimony and for further argument.

Respectfully submitted,

BON GEASLIN,
STERLING F. STOUDENMIRE, JR.,
Attorneys for applicant, Waterman Steamship Corp.

520 Investment Building,
Washington, D. C.

May 6, 1946.

96 CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing Motion has this day been served upon all counsel of record in this proceeding, by mailing to each of them a copy thereof, properly addressed, postage prepaid.

Dated at Washington, D. C. this 6th day of May, 1946.

BON GEASLIN,
Attorney for Waterman
Steamship Corporation.

Received Docket Section, Proceedings Division, May 20, 2:12 PM, '46, Economic Bureau, Civil Aeronautics Board.

Before the
Civil Aeronautics Board.

In the Matter of the Applications for certificates of public convenience and necessity authorizing additional air service to Latin America, known as the Latin American Service Case.

Docket No. 525, et al.

ANSWER OF CHICAGO AND SOUTHERN AIR LINES, INC., TO MOTION OF WATERMAN STEAMSHIP CORPORATION TO REOPEN PROCEEDING.

R. S. MAURER,
J. M. VERNER,
Attorneys for Chicago and
Southern Air Lines, Inc.

Memphis Municipal Airport,
Memphis 2, Tennessee.

Dated May 16, 1946.

Before the Civil Aeronautics Board.

In the Matter of the Applications for certificates of public convenience and necessity authorizing additional air service to Latin America, known as the Latin American Case.

Docket No. 525, et al.

ANSWER OF CHICAGO AND SOUTHERN AIR LINES, INC., TO MOTION OF WATERMAN STEAMSHIP CORPORATION TO REOPEN PROCEEDING.

Now comes Chicago and Southern Air Lines, Inc., and files this, its answer, to the motion of Waterman Steamship Corporation, filed May 6, 1946, to reopen the above-captioned proceeding to receive further evidence and for reargument, and says:

1.

That in Dockets Nos. 798, 945 and 1061, Chicago and Southern Air Lines, Inc., is an applicant for certificates of public convenience and necessity authorizing the transportation of passengers, property and mail between points in the United States and the Caribbean and Latin American areas.

2.

That the aforementioned applications were heard before Examiners of the Civil Aeronautics Board and an Examiners' Report was served on the parties to the proceeding on March 5, 1945, and that oral argument was heard before the Civil Aeronautics Board in May, 1945.

3.

That the parties and issues in this proceeding were numerous, and the record voluminous, and that a full, complete, and adequate hearing was afforded to all parties and that no party was denied the right to produce relevant evidence;

4.

That full and complete evidence and testimony were available to all parties and that evidence affecting the national defense could have been presented in closed executive session if Waterman Steamship Corporation had so requested;

5.

That the so-called new evidence suggested by Waterman Steamship Corporation is not new evidence but is merely cumulative and will not justify the reopening of this proceeding. The sole new evidence relied on by the Petitioner relates to supposed new air traffic potential between Puerto Rico and the United States. Alleged matters pertaining to air mail payments and service provided by existing carriers are matters of public record. The alleged evidence as to traffic potential being cumulative this case falls within the principle enunciated in *Pan American Airways Co. v. Civil Aeronautics Board*,[1] in which the Court stated that the only argument for a rehearing in that case that had any plausibility was based upon alleged changes in volume of traffic in the period intervening after the hearing, and thereupon denied the application for rehearing as being without merit.

[1] 121 F. (2d) 810 (CCA 2d, 1941).

6.

That the facts of record and facts of which the Board may take judicial notice including the availability of aircraft and trained personnel will fully warrant the issuance of a decision in this proceeding, and the refusal of the Civil Aeronautics Board to grant the motion of Waterman Steamship Corporation will not prejudice the rights of such party.

7.

That the allegations contained in Paragraph 15 of the petition of Waterman Steamship Corporation are without merit. Chicago and Southern has amply demonstrated that it is fit, willing and able to provide any services authorized for this company in this proceeding.

8.

That none of the allegations made by Waterman Steamship Corporation contains matters tending to show that the new evidence to be adduced would be of enough consequence to effect a material and substantial change in the facts now before the Board nor is there any indication that the alleged new matter is of such importance that it might play a decisive role in determining the result to be reached in this proceeding.

9.

That the *Atchison, Topeka & Santa Fe* case,[1] relied on by the petitioner, is not controlling in this case and rests

[1] *Atchison, Topeka & Santa Fe Railway Company v. United States*, 284 U. S. 248 (1932).
This case has been distinguished and rehearings denied in numerous subsequent cases. *Cf. United States v. Northern Pacific Ry.*, 288 U. S. 490 (1933); *Mississippi Valley Barge Line Co. v. United States*, 4 F. Supp. 745 (E. D. Mo., 1933) *aff'd.* 292 U. S. 282 (1934).

upon its exceptional facts. That the *Pan American Airways* case, previously referred to in this answer, appears determinative of the issues presented by the petitioner in this case. The matter of granting a rehearing rests within the discretion of the administrative agency and its decision thereon will not be disturbed except upon a showing of an abuse of discretion.[1]

10.

That in the interest of expediting the decisions of the Civil Aeronautics Board in new route proceedings it is highly desirable that procedural delays be avoided, and that the reopening of this proceeding to receive cumulative evidence would serve no useful purpose and would merely further delay the conclusion of this proceeding.

Wherefore, Chicago and Southern respectfully requests that the motion of Waterman Steamship Corporation to reopen this proceeding to receive further evidence and for reargument be denied.

Respectfully submitted,
CHICAGO AND SOUTHERN AIR LINES, INC.,
By R. S. MAURER,
(R. S. Maurer)
By J. M. VERNER,
(J. M. Verner)
Attorneys for Chicago and Southern Air Lines, Inc.

[1] See *Ready Truck Lines v. U. S.*, 42 F. Supp. 970 (N. D. Ill., 1941).

102 CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing answer of Chicago and Southern Air Lines, Inc., to motion of Waterman Steamship Corporation to reopen this proceeding upon all parties appearing of record in this proceeding by mailing to the attorney for each such party two copies thereof, properly addressed, with postage prepaid.

Dated at Memphis, Tennessee, this 16th day of May, 1946.

(Sgd.) J. M. VERNER,
(J. M. Verner)
Attorney for Chicago and
Southern Air Lines, Inc.

103 ORDER DENYING MOTION.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 17th day of May, 1946.

In the Matter of the application of Waterman Steamship Corp. and other applications for certificates and amendment of certificates of public convenience and necessity, known as the Latin American Service Case. Docket No. 525 et al.

Waterman Steamship Corporation, an applicant in the above-entitled proceeding, having filed with the Board on May 6, 1946, a motion requesting the Board to reopen this proceeding to receive further evidence and for re-argument; and said motion having alleged in substance (1) that hearings in this consolidated proceeding were held in September and October, 1944, and oral argument thereon held before the Board on or about May 1, 1945; (2) that no decision has yet been published by the Board nor has a certificate of public convenience and necessity been issued; (3) that the statistics and economic data submitted in evidence by the applicants and the Civil Aeronautics Board related to prewar traffic, and the post-war projections of potential traffic were hypothetical and speculative and can not form the basis of a proper decision of the Board on the question of public convenience and necessity; (4) that security regulations and the existence of a state of war prevented the applicants and the

United States Government from obtaining information sufficient to base a projected air transportation pattern in the Caribbean area; (5) that the applicant, Waterman Steamship Corporation, is now able to prove that it owns adequate aircraft and other flight equipment and has in its employ the flight, engineering and other personnel adequate to inaugurate and maintain its proposed services, although the applicant was unable to prove said facts at the time of the hearing because of the war; (6) that applicant is informed and believes it can prove that there are at least 5,000 persons in Puerto Rico who have sought in recent months, and are now seeking, to obtain transportation to the United States, and who have been unable to do so because no adequate service is available, and similarly there are in the United States thousands of applicants for transportation to Puerto Rico who are unable to obtain transportation because no adequate service is available, and that applicant was unable to prove said facts at the time of the hearing because of war conditions; (7) that Pan American Airways, Inc., has received from the United States approximately $15,000,000 for air mail transportation in the Latin American area since its inauguration of Latin American services, during this period such company has not and is not now providing adequate economical and efficient service at reasonable charges between Puerto Rico and the continental United States, and at the hearing held upon this application conceded its inability to provide adequate and efficient air transportation service between such areas at reasonable charges, except under conditions specified by it, which conditions applicant will show are impossible of attainment, and were not made in good faith, and therefore the people of Puerto Rico and in that area of the United States served by the New Orleans gateway, have been deprived of an adequate, economical and efficient air transportation service at a rea-

sonable charge; (8) that Chicago and Southern Air Lines, Inc., Delta Air Corporation, and National Airlines, Inc., have received approximately $3,000,000, $3,500,000 and $2,250,000, respectively, and that notwithstanding the receipt of such payments, neither of said air carriers has provided adequate, economical and efficient transportation over the routes or in the areas which they have been authorized to serve and are not now providing adequate, economical and efficient transportation as aforesaid, and therefore neither of such carriers is fit, willing, or able to provide services between the United States and Puerto Rico required by the public convenience and necessity; (9) that applicant proposes and is prepared to operate over the route specified in its application without the aid of air mail compensation; and (10) that upon the basis of the decision in *Atchison, Topeka and Santa Fe Railway Company v. U. S.*, 284 U. S. 260, applicant is entitled to have the record re-opened for the introduction of the evidence of changed conditions alleged in its motion; and

It appearing to the Board and the Board finding (1) that the Board in making estimates of the post-war air traffic in the Caribbean area took cognizance not only of the pre-war statistics but also of the probable post-war growth of such traffic; (2) that evidence relating to air traffic during the war period and the present transition period does not form a sufficient basis for an estimate of future air traffic to warrant the reopening of this proceeding, particularly in view of the delay which would result and which would interfere with the institution of new services to Puerto Rico and other points, and that it is in the public interest to issue as promptly as possible a decision in this proceeding; (3) that the immediate availability of flight equipment and personnel has never been considered by the Board as a factor

in deciding upon an application for a certificate of public convenience and necessity, except possibly in the case of certificates issued for the duration of the war; (4) that an insufficiency of flight equipment possessed by Pan American Airways, Inc., Chicago and Southern Air Lines, Inc., Delta Air Corporation, and National Airlines, Inc., caused by war conditions which may not yet have been overcome, and which may have caused a temporary lack of adequate, economical and efficient transportation during the war and at the present time to some extent, is not a new condition which has arisen since the hearing; (5) that the cost of new air services in the form of airmail compensation is only one of the factors considered by the Board in certificating such services, and the willingness of Waterman Steamship Corporation to operate an air service without such compensation as well as the amounts of such compensation paid in the past and required in the future by other applicants were facts known at the hearing and considered by the Board; (6) that the other allegations in the motion relate only to facts which were known at the time of the hearing or which are irrelevant to a proper disposition of this proceeding; and (7) that therefore the moving party, Waterman Steamship Corporation, has failed to set forth matters sufficient to warrant the reopening of this proceeding to receive further evidence or for reargument;

It Is Ordered, That the motion of Waterman Steamship Corporation be and it hereby is denied.

By the Civil Aeronautics Board.

(Sgd.) FRED A. TOOMBS,

(Seal) (Fred A. Toombs)

Secretary.

Copy.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

Served: .....

Docket 525, Et Al.[1]

Decided: May 17, 1946.

American Airlines, Inc., granted a permanent certificate to engage in air transportation of persons, property, and mail between the terminal point Mexico City, Mexico, and the intermediate point Monterrey, Mexico, and (a) beyond Monterrey the terminal point El Paso, Tex., and (b) beyond Monterrey the intermediate point San Antonio, Tex., and the terminal point Fort Worth-Dallas, Tex., subject to the condition that service to San Antonio shall be provided only on flights originating or terminating at Mexico City and at Fort Worth-Dallas or points north thereof.

Braniff Airways, Inc., granted a permanent certificate to engage in air transporation of persons, property and mail between the co-terminal points San Antonio, Tex., and Laredo, Tex., the intermediate point Mon-

[1] This proceeding also includes Dockets Nos. 1173, 1170, 1232, 1057, 1194, 798, 945, 1061, 445, 594, 1207, 1195, 782, 1066, 1166, 759, 1160, 416, 828, 1167, 1168, 516, 545, 689, 701, 1157, 1174, and 1164.
NOTE: THIS ECONOMIC OPINION HAS BEEN RUN ON WHITE PAPER BECAUSE OF THE LACK OF GREEN PAPER ON WHICH SUCH OPINIONS USUALLY ARE RUN.

terrey, Mexico, and the terminal point Mxiço City, Mexico.

Braniff Airways, Inc., granted a permanent certificate to engage in air transportation of persons, property, and mail between the terminal point Houston, Tex., the intermediate points Havana, Cuba, Balboa, Canal Zone, Bogota, Colombia, Quito, Ecuador, Guayaquil, Ecuador, Lima, Peru, La Paz, Bolivia, Ascuncion, Paraguay, and (a) beyond Ascuncion, the intermediate point Sao Paulo, Brazil, and the terminal point Rio de Janeiro, Brazil, and (b) beyond Ascuncion the terminal point Buenos Aires, Argentina, subject to the condition that Havana shall be served only on flights originating or terminating at points in South America.

Chicago and Southern Air Lines, Inc., granted a permanent certificate to engage in overseas and foreign air transportation of persons, property, and mail between the co-terminal points Houston, Tex., and New Orleans, La., and the intermediate point Havana, Cuba, and (a) beyond Havana, the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, and Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond the intermediate point Havana, the intermediate points Kingston, Jamaica, and Aruba and Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela, subject to the condition that local service shall not be rendered between Houston and New Orleans.

Colonial Airlines, Inc., granted a permanent certificate to engage in air transportation of persons, property, and mail between the terminal point Washington,

D. C., and the terminal point Bermuda, and between the terminal point New York, N. Y., and the terminal point Bermuda.

National Airlines, Inc., granted a permanent certificate to engage in air transportation of persons, property, and mail between the co-terminal points Tampa and Miami, Fla., and the terminal point Havana, Cuba.

Pan American Airways, Inc., authorized by amendment of certificate to operate from Brownsville, Tex., to terminal point Houston, Tex., via the intermediate point Corpus Christi, Tex., subject to the condition that local service shall not be rendered between Brownsville, Corpus Christi, and Houston.

Pan American Airways, Inc., granted a permanent certificate to engage in air transportation of persons, property and mail between the co-terminal points Houston, Tex., and New Orleans, La., the intermediate point Merida, Mexico, and the terminal point Guatemala City, Guatemala, subject to the condition that local service shall not be rendered between Houston and New Orleans.

Pan American Airways, Inc., authorized by amendment of certificate to engage in air transportation of persons, property, and mail between the terminal point New York, N. Y., and the terminal point San Juan, Puerto Rico.

Pan American Airways, Inc., authorized by amendment of certificate (1) to serve Santiago in lieu of Antilla between Camaguey, Cuba, and Port-au-Prince, Haiti, (2) to serve Sao Paulo, Brazil, between Rio de Janeiro and Porto Alegro, Brazil; (3) to carry mail

between Port-au-Prince, Haiti, Santiago, Cuba, and Kingston, Jamaica, (4) to serve Balboa in lieu of Cristobal, Canal Zone, and (5) to serve Caracas in lieu of La Guaira, Venezuela.

Pan American-Grace Airways, Inc., authorized to operate nonstop service between Balboa, Canal Zone, and Buenos Aires, Argentina, via intermediate points Guayaquil, Ecuador, Lima, Peru, and Antofagasta, Chile.

Pan American-Grace Airways, Inc., authorized by amendment of certificate to engage in air transportation of persons, property, and mail between Buenos Aires, Argentina, and Montevideo, Uruguay, subject to the condition that flights serving Montevideo shall originate or terminate at Santiago, Chile, or points north thereof, or at Salta, Argentina, or points north thereof.

Pan American-Grace Airways, Inc., authorized by amendment of certificate to serve Balboa in lieu of Cristobal, Canal Zone.

Western Air Lines, Inc., granted a permanent certificate to engage in air transportation of persons, property, and mail between the terminal point Los Angeles, Calif., the intermediate points San Diego, Calif., and La Paz, Mexico, and the terminal point Mexico City, Mexico.

Eastern Air Lines, Inc., granted a permanent certificate to engage in air transportation of persons, property, and mail between the terminal point New Orleans, La., and the terminal point Mexico City, Mexico.

Eastern Air Lines, Inc., granted a permanent certificate to engage in air transportation of persons, property, and mail between the terminal point Miami, Fla., and the terminal point San Juan, Puerto Rico.

All other applications or portions thereof, except as enumerated above, which were included as a part of this proceeding, are in all respects denied.

Appearances:

Hamilton O. Hale and *Robert L. Griffith* for American Airlines, Inc.

Leslie Craven and *S. J. Nusbaum* for American Export Airlines, Inc., (American Overseas Airlines, Inc.)

Ernest V. Moore and *John S. Wynne* for Delta Air Corporation.

Fred J. Knauer and *Elmer J. Kelsey* for Grace Line, Inc.

S. M. Stevens, Watson S. Campbell, Moultrie Hitt, and *Roy L. Steinheimer* for Atlantic Gulf and West Indies Steamship Lines.

William I. Denning, John W. Cross, and *Coates Lear* for National Airlines, Inc.

Bon Geaslin, Allen Krouse, and *Roy Keeley* for Waterman Steamship Corporation.

Roger J. Whiteford, Gerald P. O'Grady and *Philip S. Peyser* for Braniff Airways, Inc.

H. R. Bolander, Jr., and *Richard Maurer* for Chicago and Southern Air Lines, Inc.

Alexander C. Dick, Seth Richardson, and *E. S. Ridley* for Colonial Air Lines, Inc.

E. Smythe Gambrell, W. Glen Harlan, and *H. L. Russell* for Eastern Air Lines, Inc.

Melville J. France and *Gerald F. Swanton* for Moore-McCormack Lines, Inc.

Henry J. Friendly, John C. Pirie, and *J. Howard Hamstra* for Pan American Airways, Inc.

Harrison Tweed and *M. Wilson* for Pan American-Grace Airways, Inc.

Hugh W. Darling for Western Air Lines, Inc.

George M. Morris and *Albert F. Beitel* for Greater Miami Port Authority.

B. Allston Moore for South Carolina Aeronautics Commission.

H. F. Church for city of Charleston, S. C.

Raymond Saal for Orleans Airport Commission.

Frederick E. Brown and *Wilbur LaRoe, Jr.*, for Port of New York Authority.

Sadie B. Arbuthnot, J. A. Tomlinson and *Edward Dumbauld* for Department of Justice.

James D. Wise and *W. F. Cogswell* for W. R. Grace & Company.

Fowler W. Harper, Leland Graham, and *H. W. Silverman* for Department of Interior.

Wade Skinner, Edward A. McLaughlin, and *Allan Briggs* for United States Maritime Commission.

W. A. Blanton, C. J. Crampton, and *Louis W. Cutrer* for city of Houston, Tex.

James E. Farley and *William L. McIntosh* for Robert T. Bushnell, Attorney General, Commonwealth of Massachusetts.

M. O. Dunning and *C. P. Summerall* for Atlantic Coastal Cities Air Service Association.

W. Bruce MacNamee and *Sam G. Baggett* for National Federation of American Shipping.

Harry Bowen, Paul Reiber, and *Robert B. Hankins,* Public Counsel.

111 OPINION.

By the Board:

This proceeding involves applications for authority to establish new and additional air transportation services between the United States and points in Mexico, Central America, South America, and the Caribbean area. Applications in this proceeding were filed by the following: American Airlines, Inc., American Export Airlines, Inc. (American Overesas Airlines, Inc.), Braniff Airways, Inc., Chicago and Southern Air Lines, Inc., Colonial Airlines, Inc., Delta Air Corporation, Eastern Air Lines, Inc., Grace Line, Inc., Atlantic Gulf and West Indies Steamship Lines, Moore-McCormack Lines, Inc., National Airlines, Inc., Pan American Airways, Inc., Pan American-Grace Airways, Inc., Waterman Steamship Corporation, and Western Air Lines, Inc. The applications are fully described in appendix No. 1.

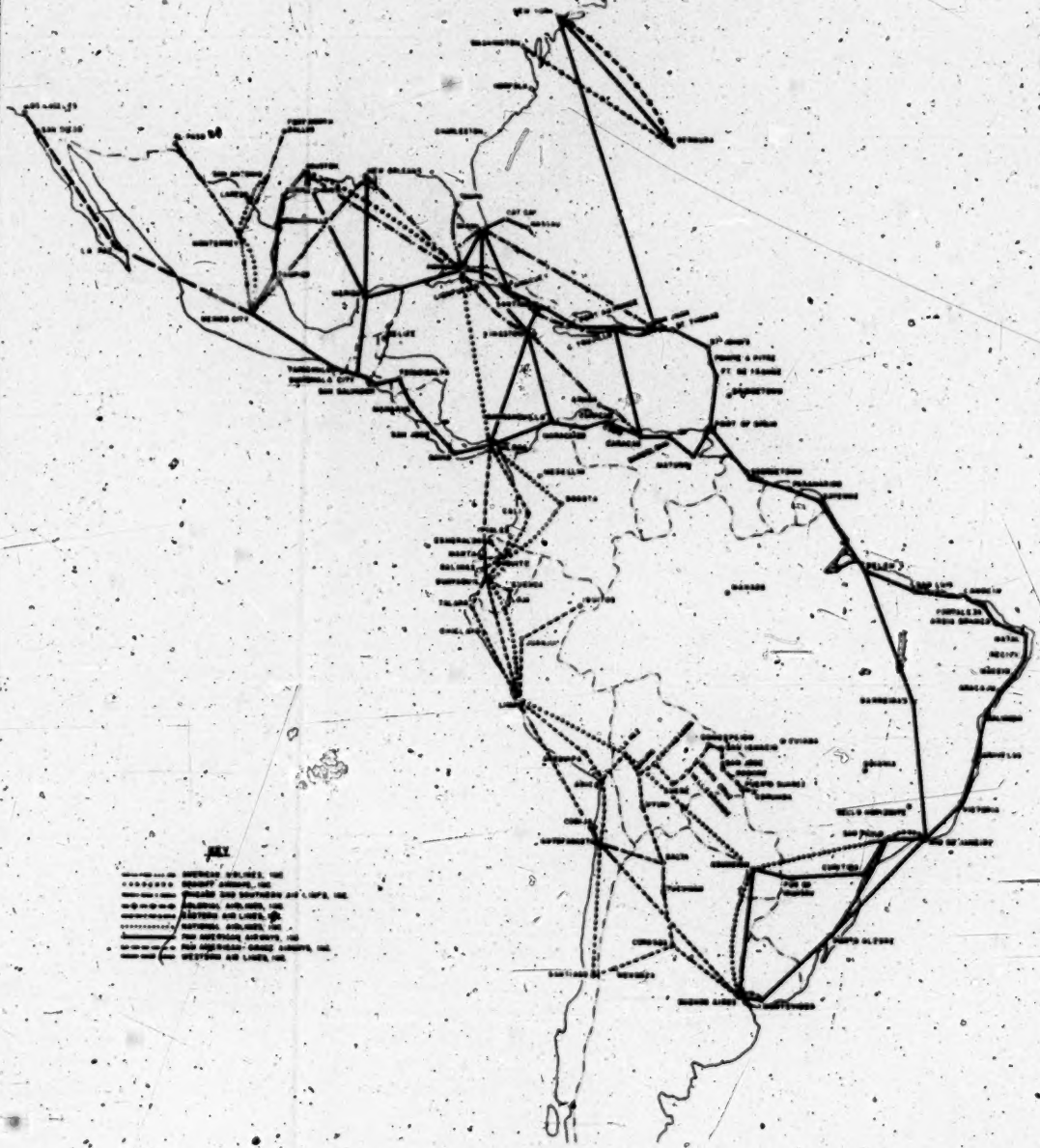
Leave to intervene was granted to Greater Miami Port Authority, city of Charleston, S. C., South Carolina Aeronautics Commission, Orleans Airport Commision, Port of New York Authority, Board of County Commissioners, Pinellas County, Fla., city of Houston, Tex., W. R. Grace & Company, Department of Justice, Department of Interior, and the Maritime Commission.

Copies of the applications with amendments were transmitted to the President of the United States as required by section 801 of the Civil Aeronautics Act. After due notice, public hearings were held before Examiners Francis W. Brown and H. Heinrich Spang from September 18 to October 13, 1944. The 23 days of hearings produced 3,963 pages of testimony in addition to the voluminous exhibits. Briefs were filed on December 14, 1944. The report of the examiners was distributed to all parties on March 5, 1945. Exceptions and briefs in support thereof were filed on March 20 and April 23, respective-

ly, and oral arguments by 15 applicants and 10 interveners were heard by the Board from April 30 to May 5, 1945.

The applications in this proceeding were filed pursuant to section 401 of the Act, which provides that the Board shall issue a certificate of public convenience and necessity authorizing the whole or any part of the transportation covered by the application if it finds that the transportation is required by the public convenience and necessity and that the applicant is fit, willing, and able to perform such transportation properly and to conform to the provisions of the Act and to the rules, regulations and requirements of the Board promulgated thereunder. Section 801 provides that, "the issuance, denial, transfer, amendment, cancellation, suspension or revocation of * * * any certificate authorizing an air carrier to engage in overseas or foreign air transportation * * * shall be subject to the approval of the President". Pursuant to that section, the Board submitted its opinion and order and certificates in the present proceeding to the President of the United States. The President, acting in accordance with his statutory authority under section 801 of the Civil Aeronautics Act has advised the Board that because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require the following changes in the Board's opinion: (1) The extension of an additional carrier to South America as far south as Rio de Janeiro and Buenos Aires; (2) The certification of Eastern Air Lines, Inc., nonstop from Miami to San Juan; (3) The certification of a second carrier between New York and Bermuda; (4) The certification of Western Air Lines, Inc., instead of Pan American Airways, Inc., for the Los Angeles-Mexico City route with stops at San Diego and La Paz. The original aposition of the Board with respect to these matters is set forth elsewhere in this opinion.

LATIN AMERICAN ROUTES
OF
UNITED STATES FLAG CARRIERS



CIVIL AERONAUTICS BOARD

General Considerations.

This case involves the proposed establishment of additional air services between the United States and its neighbors to the south including Mexico, Central America, the Canal Zone, South America, and the Caribbean area, as well as to Bermuda, and contemplates the establishment of "such an integrated air system as will serve the development of air transportation for our neighbors and ourselves." [2] The maintenance of close relations with the Latin American countries and the development of trade and travel within the Western Hemisphere make particularly important the development of a sound and efficient system of air transportation adequate to the future needs of commerce, the Postal Service, and the national defense. The future will see a sharp expansion in the volume of air commerce with Latin American countries, not only because of the recent developments in air transportation, but also because of our expanding commerecial relations with the nations to the south.

In our decision in the *North Atlantic Route* case,[3] we authorized more than one United States air carrier to operate in the international field, and we permitted a domestic operator to participate in this field. The policy underlying these decisions is applicable here and need not be repeated.

Pan American and its affiliated company, Pan American-Grace Airways, Inc.[4] (hereinafter called Panagra),

[2] Such an integrated system was contemplated in the President's letter to the Board dated September 7, 1943, in connection with its contemplated program for the establishment of additional service to this area. This letter was quoted in its entirety in *Colonial Air. et al., Atlantic-Seaboard Op.*, 4 C. A. B. 392 (1943).

[3] *Northeast Air. et al., North Atlantic Routes*, 6 C. A. B. 319 (1945).

[4] Panagra is owned 50 percent by Pan American and 50 percent by W. R. Grace & Company.

presently operates an extensive system of air transportation in Latin America, reaching the principal traffic centers in South America, Mexico, Central America, the Canal Zone, and the Caribbean area. In this proceeding Pan American has a number of applications seeking improvements in its present system and additional gateways within the United States. Although adhering to its contention that all international air transportation services should be conducted by a single company, Pan American recognizes that if a chosen-instrument policy is to be adopted by the United States, action establishing that policy must be taken by the Congress and the President and that in the absence of such action the provisions of the Civil Aeronautics Act must be applied by the Board. In this proceeding, Pan American takes the position that even under the present Act the public interest requires that its application be granted and that those of the other applicants be denied.

Pan American is here opposing the other applications on the grounds (1) that the airline which has pioneered a route or territory should be permitted to continue long-standing plans to develop that route or territory to the point of efficient utilization of its facilties, (2) that the public interest requires a coordination of the express services on the different routes and also a coordination of local feeder services with these express services, (3) that the public is interested in the economies which are possible through the utilization of large high-speed aircraft which could not be efficiently utilized if the traffic must be shared by two or more American-flag operators, and (4) that increasing foreign-flag competition will supply all the competition required by the public interest.

Pan American presented a general program for the postwar operation of its service to Latin American coun-

tries which it said was designed to provide a high-speed, low-cost service in order to develop mass transportation throughout this area. Various amendments to its existing certificate are requested for the purpose of facilitating its program. In addition to the gateways through which it presently conducts its Latin American services, namely, Miami, New Orleans (on a temporary basis) and Brownsville, Pan American seeks to inaugurate service through additional gateways,—New York, Charleston, Tampa, Houston, and Los Angeles.

Pan American's program contemplates a very substantial growth of traffic in the postwar period. It is predicated upon the development of an operation with planes of much larger capacity and greater speed than those currently in commercial service. In the Latin American service Pan American proposes to make use of three types of planes, designated as Type 8, Type 9, and Type 12.[5] It contends that the use of these large high-speed

[5] Type 8 is a 4-engine plane with a cruising speed of approximately 322 miles per hour and with 56 seats as a day plane and 8 berths and 44 seats as a night plane. It is the Model 549 Lockheed Constellation, an improved model of the Constellation now in service. Type 8 has been produced in prototype as the Lockheed Constellation. No final contract has been entered into for the purchase of this equipment although Pan American was one of the original contractors for this plane and has an option agreement with the Army with respect to 40 of these planes.

Type 9, the Douglas DC-7 plane, is a 4-engine aircraft with a cruising speed of 296 miles per hour and with capacity for 108 day passengers or 54 berths. For its operation Pan American proposes to have 12 berths, 4 staterooms and 59 reclining seats, accommodating 79 passengers at night and 95 passengers during the day. Pan American's witness testified that, assuming an early termination of the war, this aircraft should be available early in 1946. Type 9, the Douglas DC-7, has not been produced in prototype but is under active construction. Plans and specifications and performance data are available and Pan American has signed a contract for the purchase of this type of equipment.

Type 12, a modified Douglas Sky Bus, is to be a twin-engine aircraft with a capacity for 24 passengers and a cruising speed of 226 miles per hour. There was no indication as to when this plane will be available; Pan American stated that it contemplated operating with DC-3's if the plane fails to meet specifications or is not ready.

planes will realize economies of operation which will permit rate reductions. It says that with Type 9 aircraft, having a passenger capacity of about 100 and operating at a 60-percent load factor, the direct flying costs per passenger mile would be 2.13 cents as compared with 2.85 cents on the 50-passenger Type 8 plane. Pan American states that it also contemplates more frequent schedules which it asserts will reduce ground costs and achieve other economies. In order to attract a large volume of traffic and to make possible the use of this equipment, Pan American says it plans substantial reductions in passenger fares. Its prospective fares range from 3½ cents to 5 cents per passenger mile, which, after allowance for discounts, would produce an average net revenue of 4.25 cents per passenger mile.

Pan American testified that it plans substantial reduction in air express charges. It proposes to inaugurate class rates constructed on the distance principle, and thereby to effect a reduction in the "average air cargo rate" from 80 cents to approximately 25 cents per ton-mile. Rates for first class (commodities of relatively high value benefiting significantly from the time saving) will, it is said, vary from 40 cents per ton-mile to 20 cents; for second class (commodities of lower value which have yet to move in quantity by air) from 25 to 15 cents per ton-mile; and for third class (commodities of little intrinsic value but benefiting from speed) from 15 to 10 cents per ton-mile; in each instance the lower rate applies for carriage of 5,000 miles or over.

The air mail postage between the United States and Latin America varies with distance, ranging from 8 cents per half ounce to Mexico and Cuba to 20 cents to Argentina. Pan American suggests a uniform postage of 10 cents per half ounce be made applicable by the Post

Office Department in Latin America and states that when such a rate is established it will quote correspondingly low rates for the carriage of the mail of Latin American countries to the United States.

Pan American asserts that the authorization of any additional carriers to Latin America will prevent the establishment of mass transportation at low rates. It contends that the limited traffic potential requires a strict limitation of the number of United States air carriers authorized to operate.[8] It contends that even on its optimistic traffic estimates only 3.56 one-way trips per day could be operated, less than half the average frequency of the entire domestic system in 1941, a frequency which was exceeded in that year by every domestic airline except Continental, Mid-Continent, and Inland.

Pan American emphasizes the foreign competition which it anticipates, referring to the prewar operations of international services by foreign operators and to recent developments indicative of the establishment of substantial networks of national airlines throughout Latin America. As an illustration it refers to TACA as contemplating the establishment of air routes throughout South America and the Caribbean area with termini at New York, Miami, and Los Angeles, to the proposed operations of Aerovias Braniff to Los Angeles, Nogales, San Antonio, Brownsville, and Miami, and to the operations of Royal Dutch Air Lines, KLM, from Curacao to Miami.

[8] Pan American cites data for 1938 to show that more than 216,000,000 rail passengers traveled in the United States as compared with slightly more than 320,000 between the United States and Latin America by sea and rail. There were approximately 20,000,000 domestic Pullman passengers as compared with 226,500 first-class, cabin, sea, and Pullman passengers between the United States and Latin America.

The other applicants emphasize the need for strong competitive services and challenge the quality and progressiveness of Pan American's operations in Latin America. It is asserted that as a result of the complete monopoly of Pan American and its 50 percent owned affiliate, Panagra, the development of air transportation service has lagged behind that developed by domestic air carriers in the United States. It is remarked that schedules have averaged less than daily frequency and that night operations were not conducted, thus prolonging transit times and causing delays.

Pan American contends that it has been difficult to develop fully its services under prevailing conditions. The relatively low traffic potentials, its extended routes, and the necessity of developing and maintaining airways at its own expense are said to have limited its ability to establish service similar to that provided by domestic carrier. It also asserts that uncertainties as to government policy relating to operations in Latin America were an important limiting factor.[7]

Testimony was introduced by Eastern respecting the alleged inadequacies of Pan American's service such as its failure to conduct operations in such a manner as to develop fully the air traffic potential and to cooperate in the solicitation of passengers destined for further travel in the United States. Considerable evidence was adduced by Pan American witnesses alleging deficiencies in the service of Eastern. Much of this testimony related

[7] Pan American points out that its Latin American mail contracts were due to expire in 1939, that during the period intervening between that time and the cancellation of the domestic mail contracts in 1934 there was considerable discussion and agitation for new legislation with respect to this service, and that the possibility of readvertising the foreign contracts made its tenure in Latin America so uncertain as to have made extensive capital expenditures from 1934 through 1938 unjustified.

to operations subsequent to the outbreak of the war and cannot be accepted as indicative of operations conducted under normal peacetime conditions.

In summary, Pan American's argument for preserving its position as the sole United States carrier in Latin America is economic: rate reductions to enlarge the market for air-transportation services; larger planes and more frequent services to reduce unit costs; and reliance upon foreign-flag competition to provide the competition required to insure efficient operations, technological progress, and reasonable rates. These arguments deserve careful consideration and must be assayed in the light of past experience and of our best judgment as to what the future holds. From its inception, the Board has given careful study to similar economic problems in both domestic and international operations of both United States and foreign-flag carriers. These arguments for a single carrier are similar to those advanced in the *North Atlantic Route* case, and we have been unable to find any basis in the record in this case to lead to a different conclusion here.

The specific considerations urged by Pan American fail to support a finding that it should remain the sole United States carrier to Latin America. The advantages of using larger planes can be overemphasized, particularly if the use of larger equipment involves a sacrifice in flexibility of operations and frequency of service, two of the important inherent advantages of air transportation.[8] Only as the market develops to assure satisfactory

[8] In *Northeast Air. et al., North Atlantic Routes*, we stated:

"We recognize it as probable that substantial reductions in seat mile operating costs can be made by using aircraft of greater capacity than are now available. The precise extent of such savings and the extent to which they will continue to accrue as aircraft become indefinitely larger are questions upon which there appear to be marked differences of opinion. Very large aircraft,

load factors, does the use of the larger planes offer economies which can be passed on to the traveling public. Large-scale operations with any type of plane frequently offer important potential economies, both in direct unit operating costs and in unit overhead costs. However, the best assurance that these potential economies will be achieved in operation and that they will redound to the advantage of the public lies in the presence of actual or potential competition.

The achievements of Pan American in pioneering and developing trunkline air transportation services throughout Latin America are recognized. Its activities established a substantial air network whose contributions to the war effort were extensive. However, as the pioneering period is succeeded by a period of more intensive air operations and expanded demand for air transportation, it is in the public interest and in the interest of the industry, including, we believe, Pan American, that additional carriers be authorized to serve certain parts of Latin America. Pan American as the first in the field will always retain those intangible advantages which accrue to the pioneer.

It is not our intention to encourage a waste of public money or private investment through the establishment

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of course, bear a certain handicap in that they require a sacrifice in flexibility of operation and in frequency of schedules. As the unit size of the aircraft used increases, a tendency to reduction of average load factor may ultimately be expected. If the economic benefits of the use of aircraft of extremely large size should prove to be as great as predicted by Pan American's witnesses, and if it should prove practicable to reduce rates to as low a level as Pan American proposed, the total volume of patronage of transatlantic service may be expected to increase to far above the general level of traffic estimates based on more conservative expectations of future cost reduction. The use of aircraft of very large pay load capacity is therefore likely only in conjunction with a very large traffic, since the conditions that would justify such aircraft would also assure the large patronage."

of a multiplicity of air transportation services where the potential traffic and the public interest do not require such services. In the present case, therefore, we have carefully examined the full record, including evidence with respect to the movement of traffic between the United States and Latin America in the past and estimates for the future in the light of the substantial developments which may be anticipated.

Thus the immediate question presented is whether additional carriers should be certificated on routes presently served to assure the benefits of competition while avoiding that overdevelopment of service which might undermine the sound economic basis for the industry's future growth; or, stated in statutory terms, it is: How much additional air service is now required to provide the "competition * * * necessary to assure the sound development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service and of the national defense."

In the present proceeding Pan American has again advanced the arguments which were presented in the *North Atlantic Route* case against the operation of domestic air carriers in international services. It reasserts that if these carriers are permitted to extend their operations in Latin America Pan American will be at a serious disadvantage in competing for traffic. Domestic air carriers authorized to engage in international air traffic would undoubtedly have some advantages over Pan American in this respect and this factor has been considered.

In view of the fact, however, that in the present decision Pan American is authorized to conduct new and important operations from points in the United States to

various centers in Latin America, it does not appear that this carrier will be at any competitive disadvantage in its overall position by reason of the entry of domestic carriers into international operations. On the contrary, it is reasonable to conclude that its overall position will be strengthened.

Route Pattern.

One June 14, 1944, the Board announced the international routes which it tentatively concluded would be desirable for the postwar operations of United States carriers, exclusive of services from the United States and Alaska terminating in the contiguous countries of Canada and Mexico.[9] Some of the routes listed are now be-

[9] The routes then contemplated for Latin America were as follows:

IX. Miami-San Juan-Trinidad-Belem:
- (1) Belem-Fortaleza-Natal-Recife-Victoria-Rio de Janeiro.
- (2) Belem-Barreiras-Rio de Janeiro:
  - (a) Rio de Janeiro-Porto Alegre-Montevideo-Buenos Aires.
  - (b) Rio de Janeiro-Sao Paulo-Asuncion-Buenos Aires.

X. Miami-Havana-Merida.

XI. Miami-Cienfuegos-Kingston:
- (1) Kingston-Cristobal.
- (2) Kingston-Barranquilla.

XII. Miami-Nassau.

XIII. New Orleans-Merida-Guatemala City.

XIV. Brownsville-Mexico City-Guatemala City-San Salvador-Tegucigalpa-Managua-San Jose-Balboa-Cristobal:
- (1) Cristobal-Barranquilla-La Guaira-Trinidad.
- (2) Cristobal-Medellin.

XV. Cristobal-Cali-Guayaquil-Lima-Arica:
- (1) Arica-La Paz-Buenos Aires.
- (2) Arica-Santiago-Buenos Aires.
- (3) Arica-Antofagasta-Salta-Buenos Aires and certain connecting services.

XIV. New York—a point in southeastern United States—Cuidad Trujillo or Port-au-Prince-Caracas-Manaos:
- (1) Manaos-Goiania-Bello Horizonte-Rio de Janeiro.
- (2) Manaos-Cuyaba-Corumba-Asuncion-Buenos Aires-Montevideo.

XVII. New Orleans-Havana-Santiago-Port-au-Prince-Ciudad Trujillo-San Juan.

XVIII. Tampa-Havana.

XIX. Balboa-Cali-Iquitos-La Paz-Buenos Aires.

XX. New York-Charleston-Nassau—A point or points in Cuba—Kingston-Balboa (or Cristobal).

ing served in whole or in part under temporary or permanent certificates issued by the Board.

These tentative conclusions and many of the underlying data were incorporated in the present record. Further consideration has led us to modify the tentative route pattern in certain respects.

Traffic.

Much information with respect to the historical movement of passengers, property, and mail was incorporated in the record. One study, Overseas Air Service Patterns, Transcaribbean and Offshore-Island Areas,[10] is an exhaustive compilation of data with respect to the movement of air and sea traffic in this area. In adddition, data with respect to the volume of airborne traffic were submitted by the present air carriers. Similar data with respect to sea traffic were compiled by several steamship applicants.

The Overseas Air Service Patterns study reveals that during the year 1941 there were 665,771 travelers by air in the Latin American region, exclusive of Bermuda. Of this total, 435,496 were local passengers within the confines of their respective countries, 108,155 moved between these countries and the United States, and 122,120 were other international travelers.[11]

In 1941 Pan American and affiliated companies carried all of the international travel with the United States. Pan American and its affiliates carried 36 percent of the

[10] Report prepared by F. H. Crozier, Chief, Research and Analysis Division, Civil Aeronautics Board, August 1944.

[11] See appendix No. 2, table 1, Overseas Air Service Patterns—Transcaribbean-Island Areas Analysis of Total Air Travel by Classification of Carrier, Traveler, and Geographic Area—1941.

other international travelers, and of the total international traffic, including travel to and from the United States, they carried 66 percent. Pan American and its affiliated companies carried 41 percent of the national travelers.

In the years ahead certain changes may be anticipated in the distribution of traffic among international carriers. The inauguration of service to the United States by the national carriers of Latin American countries will naturally cut into what has heretofore been an exclusive United States market. Despite the prospective increase in international services by foreign-flag carriers, United States air carriers may expect to participate substantially in other international traffic between Latin American countries if they operate with larger equipment and more frequent schedules. United States carriers will presumably be more successful in competition involving longer journeys, which will produce the larger number of passenger miles of travel. We anticipate, in view of the very large proportion of international travel contributed by the traffic-generating capacity of the United States, that United States carriers will secure not less than 50 percent of the international travelers and a somewhat greater percentage of the passenger miles of services performed for the international travelers in Latin America and between Latin America and the United States.

The record contains analyses of historical traffic data relating to both surface and air transportation between the United States and Latin America and within Latin America. A number of the applicants have submitted estimates of the potential market for air transportation or of the volume of traffic which the applicant hopes to secure. Most applicants have taken as their starting

point the historical studies contained in Overseas Air Service Patterns, Transcaribbean and Offshore-Island Areas, *supra*. Table 2, Penetration of 1938 sea and air total passenger traffic by 1941 air passenger traffic, summarizes the historical sea and air travel.[12] It also shows the percentage of penetration as of 1941 of the 1938 sea and air passenger traffic market by air transportation. It has been necessary to use data for 1938 as this is the latest year for which complete and detailed information is available. In 1938 there were 390,184 first and cabin class sea and air passengers. It has generally been assumed that first and cabin class sea passengers afford the best potential market for overseas air carriers; however, in view of the long distances involved, the important savings in time, and the prospective reduction in air rates, it may be anticipated that a significant number of those who do not use first and cabin class sea accommodations will take advantage of air travel. In 1938 there were 425,329 air and sea passengers.

By 1941 air transportation amounted to 29 percent of the first and cabin class sea and air traffic; it amounted to nearly 27 percent of the total traffic. The 1941 penetration was 30 percent to the Canal Zone, 41 percent to Colombia, 48 percent to Venezuela, 33 percent to Brazil, and 39 percent to Argentina. These figures indicate that air transportation has been relatively successful in competition with surface carriers. However, they do not suggest that, even assuming no increase in the total volume of travel between the United States and Latin America, air transportation has yet reached its full potential market. Indeed, the penetration of the total travel market has been relatively modest in view of the significant advantages which air transportation has to offer to the traveler.

[12] Appendix No. 2.

Some of the estimates of potential traffic introduced by the carriers support the general expectation of a substantial increase in the volume of air transportation. Pan American's estimate as to the potential outbound traffic from the United States assumes significant improvements in service and substantial reductions in rates.[13] The overall conclusion of Pan American is that the air passenger traffic will be more than half again as much as the total first class sea, rail, and air transportation in 1938. Remarkable increases in traffic volume are assumed to more distant countries where improvements in service as well as reductions in rate and important savings in time are expected to enlarge greatly the potential market. Thus, Pan American assumes that there will be a nearly elevenfold increase in traffic to Brazil, a ninefold increase in traffic to Argentina and Uruguay, and a nineteenfold increase in the traffic to Paraguay. For all other countries with the exception of the Guianas, it is assumed that the outbound air passenger traffic will equal or exceed the total sea, rail, and air traffic for 1938.

The Grace Line, applying to serve as a connecting carrier between the northern terminus of Panagra at Panama Canal and New York, estimates that 52,505 persons a year will travel southbound and 51,838 northbound from and to the United States, respectively.[14]

The passenger traffic estimates submitted by Moore-McCormack Lines[15] are very significant coming from a steamship company. These estimates indicate an expec-

[13] See appendix No. 2, table 3, Comparison of estimated postwar outbound air passenger traffic, by countries, with air and surface passenger traffic for 1938.

[14] See appendix No. 2, table 4, Grace Line, Inc., estimate of future air passenger movements between the United States and named points.

[15] See appendix No. 2, table 5, Passenger traffic estimates for areas served by proposed Moore-McCormack routes.

tation that the total number of passengers by air will be three times the number by steamship to the east coast of South America and the Caribbean area in the first year after the war, and that in the fifth year after the war the number of passengers by air will be more than four times the number by sea.

The foregoing estimates indicate the expectation of substantial increases in the volume of air travel. All of the applicants also anticipate substantial volumes of international traffic other than that of United States origin or destination. These expectations appear to be justified by past experience and by the improvement in service which air transportation is now prepared to give to the traveling public. The estimates of other applicants are less comparable and all-inclusive, relating to traffic volumes with respect only to the traffic-generating areas served by each within the United States or to the traffic each hopes to secure in competition with other air carriers. To indicate what the estimates mean in terms of schedules operated, it may be noted that Pan American estimates 800 passengers a day outbound from the United States, the Grace Line 146, and Moore-McCormack 153 in the third postwar year. If these expectations are even approximately fulfilled, it is apparent that more schedules and larger aircraft will both be justified. However, these results are not assured. They are attainable only if substantial reductions in costs and rates are achieved, and to an indeterminate but substantial extent they are dependent upon a high and sustained level of production and trade.

A significant volume of travel may come from vacationers who have been among the cruise passengers in the past. Exhibits indicate that on Nassau cruise ships in 1938, 4,890 passengers arrived in the United States

and 3,344 sailed from the United States. Data with respect to Caribbean cruises show that 65,865 passengers arrived in the United States and that 67,012 passengers sailed from the United States.

For convenience of analysis the Overseas Air Service Patterns study divides the territory into three areas: (1) Mexico, Cuba, and the Bahamas, (2) the Caribbean region, including the islands of the Caribbean, Central America, and the north coast of South America, and (3) the remainder of South America. Table 6 [16] shows the 1941 volume of passenger air traffic divided among these three areas and by classes of traffic. The air travel in the first area is heavy and short-range with a large portion of the journey within the continental limits of the United States. The first area accounts for 38 percent of the total international travel and 77 percent of the total travel interchanged between the United States and Latin America. Only 2 percent of the air travelers from this area were destined to foreign countries other than the United States. The travel for the second area was substantially greater than that for either of the other two, 38 percent of the international travel being attributed to this area. The third area's travel was principally between Rio de Janeiro and Sao Paulo, Buenos Aires, Santiago, and other large traffic centers of South America. National travel accounted for almost 75 percent of the total travel in this area and only 2.7 percent of the total travelers for the area originated or terminated their journeys in the United States.

On the basis of these data, the Overseas Air Service Patterns study concluded that the Caribbean area appears to offer the best promise of all the Latin American territory for commercially profitable air traffic and that

[16] See appendix No. 2, table 6, Distribution of 1941 air passengers by area and class of travel.

this traffic will be principally of United States origin. This conclusion is consistent with the record in the present case.

Complete data with respect to mail were available only for the fiscal year ended June 30, 1940. These data are set forth in table 7,[17] which shows the pounds of first-class mail forwarded by sea and by air from the United States.

Poor transportation conditions in Latin America have made this area particularly favorable for the development of air express and air cargo. Traffic data for 1941 disclose that the express pound-miles on the international services of Pan American and Panagra amounted to 5.05 percent of their total business as compared with 2.34 percent for the domestic air carriers. Cargo assumed an even greater importance for its national companies; in 1941 the express pound-miles amounted to 10.34 percent of the total business for Pan American's national subsidiaries.[18]

No attempt is made at this time to predict the precise number of schedules which United States carriers will be justified in operating to and within Latin America. Air traffic has developed to the point where service is now planned primarily with reference to the requirements of passenger travel. The historical development of air transportation and an analysis of the data before us in this proceeding lead to the conclusion that some increase in United States-flag services to certain parts of Latin America is justified. For the immediate future, the most promising travel markets lie between the United States

[17] See appendix No. 2, table 7. Summary of first class mail traffic from the United States to Latin America and Bermuda.

[18] Uraba, Medellin & Central Airways, Panair de Brasil, Cia Cubana de Aviacion, and Cia Mexicana de Aviacion.

and the Central American and Caribbean areas including the north coast of South America. There is reason to expect that in the more distant future substantial increases in American services to South America will be warranted. With an increase in trade and closer cultural relations between the United States and Latin America, substantial increases in the volume of air mail are to be anticipated, and this trend will be accentuated if air mail postage rates are reduced. The volume of air cargo moving between the United States and Latin America is already substantial. It has been stimulated by wartime conditions and it is to be expected that substantial increases in air cargo movements will come with the return of peace.

United States Gateways.

Data respecting sea and air passenger traffic disclose the seaport and airport gateways but not the areas of origin within the United States. In order to allocate the total traffic to the various sections of the United States recourse was had to passport applications for the calendar year 1938, which show the states of origination and the overseas destination of travelers. Inasmuch as passports were not required for limited visits to the Bahamas, Bermuda, Cuba, Dominican Republic, Haiti, Jamaica, El Salvador, Guatemala, British Honduras, Panama, Mexico, and British Guiana, there is substantial divergence between the passenger movements and passport applications for these areas. Although 40 percent of the total sea passengers move to Bermuda, Central American, and South American areas, only 7 percent of the passport applications were for travel to those areas. Except for travel to Bermuda, the Bahamas, and Cuba, the passport percentages constitute a large proportion of the total sea and air traffic; hence the Overseas Air Service Patterns

study concludes that passport data reasonably represent the origin of sea and air travelers except to those destinations.[19]

Bermuda as a recreational area receives most of its passenger traffic out of the port of New York, and is of primary interest to residents of the North Atlantic, Middle Atlantic, and the North Central states. Published reports of the Bermuda Trade Development Board for 1938 afford a basis for determining the areas of origination of passenger traffic to Bermuda. Traffic to the Bahamas and Cuba has been allocated to United States points of origin on the basis of material published by the Nassau Information Bureau with regard to the origin of passengers arriving in Nassau.

Inasmuch as only a relatively small proportion of the traffic between the United States and Mexico moves by sea, use of the steamship passenger traffic data does not measure the potential travel market to this area. The 1940 rail traffic between the United States and Mexico amounted to 32,869. Adding to this figure the 1938 first and cabin class sea traffic of 8,355 and the 1938 air traffic of 5,671 yields a total of 46,895. In 1941 air traffic to Mexico moved through the three gateways—Los Angeles 2,174, Miami 458, and Brownsville 4,414. Mexican traffic was allocated on the basis of the 1941 gateway traffic in relation to the sources of Latin American traffic indicated by the passport data.

A classification of estimated historical travel by areas of origination and destination from the United States to Latin American and Off-shore Island areas primarily for

[19] Overseas Air Service Patterns, Transcaribbean and Offshore-Island Areas, pages 41 and 42.

1938 appears in tables 8, 9, and 10.[20] Table 8 classifies the number of travelers by United States areas of origination and Latin American areas of destination. Table 9 indicates the percentage distribution of travel from each United States area of origination among the several Latin American areas of destination. Table 10 indicates the percentage distribution of the travelers arriving at each Latin American area of destination among the several United States areas of origination.

Approximately 75 percent of all United States travel was destined to the Bahamas, Cuba, and Mexio. An additional 8 percent was destined to the Canal Zone and Central America, and the remaining 17 percent to South America and other West Indies (table 9, column 7). In general, there was a somewhat less highly concentrated distribution of originations among the several United

[20] See appendix No. 2.

The travel market for the future will not be limited to that traffic which historically moved by sea and air but will include a substantial volume of new travellers attracted to South America by improved transportation facilities and closer business ties. Nevertheless for the purpose of providing a distribution of traffic to routes and areas, the potential air travel market is assumed to be total historical surface travel, exclusive of cruise steamship and highway travel and the relatively minor portion of regular sea travel using accommodations inferior to first-class and cabin-class. The figures selected to represent this potential market include all outbound air travel and first-class and cabin-class sea travel from the United States to the general region here under consideration for the year 1938 except with respect to United States-Mexico travel. Constructive totals for United States-Mexico travel are based on a combination of sea, air, and rail figures which, due to inadequacies of underlying material, are not wholly coordinate as to periods covered. Tests of available material indicate that the potential thus derived is on a general parity with figures for the region as a whole. It is assumed that inbound travel corresponds both in volume and pattern to outbound travel.

Estimates are based on 1938 sea and air travel for all data except United States-Mexico travel; the latter is based on 1940 rail travel. For sources and treatments, see tables appearing on page 83 and technical notes on pages 42 and 43 of Overseas Air Service Patterns—Transcaribbean and Offshore-Island Areas. References hereinafter in this opinion to air travel based on 1938 data must of course be considered in the light of the foregoing discussion, particularly with respect to the anticipated increase in travel between the United States and the points here involved.

States areas. Approximately 50 percent of all originations were attributable to the Northern and Middle Atlantic states, 10 percent to Florida and the South Atlantic states, 19 percent to the North Central states, 8 percent to the South Central states, and 13 percent to the Northwestern and Southwestern states (table 10). The short-haul travel to the Bahamas and Cuba was, however, highly concentrated both as to areas of originations and areas of destination. Approximately 50 percent of all travelers went to these two offshore-island areas, and of the travelers arriving in these areas from the United States, approximately 96 percent originated in Atlantic Seaboard and North Central states.

Miami and Brownsville are the only gateways now designated in permanent certificates of American-flag international carriers operating to Latin America (exclusive of Bermuda). Under temporary authorizations New Orleans, Fort Worth-Dallas, and El Paso have been named as additional gateways. Los Angeles has also served as a gateway for international traffic moving to Mexico City over Cia Mexicana de Aviacion, S. A. (CMA), Pan American's affiliate; and through a connection between Braniff and the same company, Laredo has served as a gateway for traffic destined to Mexican points. The recent inauguration of service by Aerovias Braniff, a company organized and controlled by T. E. Braniff, president of Braniff Airways, has provided an additional service for traffic destined to Mexico City through Laredo. In the present proceeding it is proposed by the applicants to make New Orleans, Fort Worth-Dallas, and El Paso permanent gateways and also to establish direct service from New York, Norfolk, Charleston, Tampa, Houston, Laredo, and Los Angeles.

The Port of New York Authority, an intervener, conducted an extensive survey of the traffic potentials and the directions of traffic flow and submited testimony on these matters. New York has long been the country's principal port. Although the New York district accounted for only 8.1 percent of the population of the United States in 1940, it accounted for 52 percent of the total trade with Latin America in 1938, 58 percent of the waterborne passenger traffic moving between the United States and Latin America in 1938, and 80 percent of the mail dispatched to South America in 1940.

The New York district is important not only as a gateway but also as an originating source of traffic. A study of passport applications in 1940 reveals that 42 percent of the travelers between the United States and Latin America were residents of the nine northeastern states, 32 percent were residents of New York, New Jersey, or Connecticut, and over 16 percent were residents of New York City. In addition, studies by the Port of New York Authority and by the United States Maritime Commission show that about 50 percent of the foreign trade moving through the New York port is of local origination or destination. Reference was also made to the fact that the cost ascertainment report of the Post Office Department for the year ended June 30, 1942, shows that 41 percent of the mail for Latin America originates in the New York City and Brooklyn post offices.

The Port of New York's interest is to insure the establishment of direct one-carrier international air service from New York in order to serve the community of interest existing between it and Latin America. In 1937 a total of 213,192 waterborne passengers moved between New York and Bermuda and Latin America. The witness for the Port of New York predicted that 50 per-

cent of this traffic, or 106,600 passengers, would travel annually between New York and Latin America. This traffic potentional would, it was said, justify the operation of four or five DC-4 schedules daily in both directions.

In estimating the potential air cargo, the witness relied upon a study of the Department of Commerce [21] which indicates that the maximum air freight potential between the United States and Brazil, based upon 1939 trade data, would be 7.7 percent of the total value of the trade at an average value per pound of 94.1 cents. The witness concluded that air freight estimates based upon 5 percent of the value of prewar trade would represent a conservative estimate of the postwar potential; on this basis he arrived at an annual estimate of 29,000,000 pounds for the postwar period. The air mail potential was estimated by the witness on the basis of international letter mail at 700,000 pounds annually, sufficient to supply about 200 pounds per flight to the four or five DC-4's necessary to accommodate the air passengers and air freight potential.

Particular reference was made by the Port of New York Authority to the substantial time savings which would result from direct service between New York and San Juan. The mileage between New York and San Juan by connecting carriers and best present nonstops between New York and Jacksonville, Jacksonville and Miami, and Miami and San Juan, is 2,209. The direct route between New York and San Juan is 1,612 miles. A direct service from New York through San Juan would effect corresponding savings in mileage and time to the east and north coasts of South America.

[21] Bureau of Foreign and Domestic Commerce. Air Cargo, Potentials between the United States and Brazil. July 1944.

Although not a formal party to the proceeding, the city of Philadelphia and the Chamber of Commerce and Board of Trade of Philadelphia entered appearances and introduced data with respect to the importance of that city as a source of potential air traffic. Philadelphia with its adjacent area is an important industrial community. The Philadelphia Customs District records 1937 exports to Mexico, Central America, and the Caribbean Islands at $997,633, with imports at $27,037,726. Similar figures for South America were $16,348,044 and $34,065,334. A brief filed by Philadelphia urged the Board to make that city an international air terminal for Latin American service. Philadelphia argued that international air transportation service should be apportioned among the Atlantic seaboard cities "so as to best serve the national interest and at the same time serve the public convenience and necessity of each area in accordance with its traffic potential", that additional landings and takeoffs proposed in the present proceeding and in the North Atlantic and South Atlantic proceedings at New York would result in too many landings and takeoffs to permit safe and convenient operations in that area. Philadelphia concluded that it has the capacity and the facilities, that its metropolitan area is one of the greatest consuming and producing areas of international air cargo in the world, that it has more favorable meteorological conditions than the Atlantic seaboard points under consideration and that practically all of the traffic moving from the rest of the United States to New York must move through the Philadelphia area.

Norfolk has been suggested as a terminal point for one of the routes proposed by Colonial. It has a population of almost 150,000; it is an important Atlantic port and the site of important United States naval installations. It is the terminal for Pennsylvania-Central's route No. 14 from

Washington, D. C., to Detroit, Mich., and route No. 51 from Knoxville to Norfolk, and is an intermediate point on National's route between New York and Florida.

Charleston has been suggested as a gateway for C ribbean service by several applicants. It was named as a point of one of the Board's tentative routes to Balboa. It is located about midway between New York and Miami and had a population of almost 100,000 in 1940. It is the terminal for Delta's route from the west and is an intermediate point on the routes of Eastern and National between New York and Florida. It is also served by a number of trunk-line railroads.

Charleston contends that its central location makes it an advantageous distributing point for Latin American traffic, that it has very favorable climatic conditions, being well south of the winter storm area and north of the hurricane belt, and that it would have a considerable mileage advantage over Miami on traffic destined to Nassau and other points in the Caribbean. Colonial, from an analysis of traffic to Nassau over Pan American in the months of January, February, March, and April, 1941, concluded that 2,568 of 3,758 passengers between Miami and Nassau originated at points north of Charleston and would be afforded a more expeditious service through Charleston.

The Greater Miami Port Authority intervening contends that the public convenience and necessity and the national policy require that the additional services proposed should be via Miami. The Miami Port Authority contends that the city's geographical location and its established relations with the Latin American countries justify its continuance as the gateway for traffic between the United States and that area.

As an indication of the relative importance of Miami and New York as gateways for foreign travel, the Miami Port Authority submitted figures with respect to the volume of such travel between the respective gateways and made particular reference to the comparative volumes subsequent to 1941. These data indicate that there was a greater volume of traffic moving through Miami than through New York. However, because of the war condition in Europe, figures comparing the volumes of trade subsequent to 1940 cannot be accepted as indicative of the relative volume moving through these gateways. Examination of data submitted by the Miami Port Authority shows that prior to 1940 the ratio of foreign travel through New York was almost seven times as great as that through the Miami gateway. Miami also submitted data showing the volume of foreign trade between the United States on the one hand and Latin American points on the other for the years 1941 through 1944, inclusive. These data show a steadily declining volume of traffic moving through the New York gateway and a substantially growing proportion moving through the Miami gateway. Here again the abnormal wartime conditions must be taken into consideration.

The volume of foreign air traffic entering through the Miami gateway was also cited to support Miami's position. In 1939 there were 32,716 passengers entering the United States by air at Miami as compared with 5,543 through the Newark airport; in 1940, 40,402 at Miami as compared with 11,242 at New York, and during 8 months of 1941, 36,402 at Miami and 9,734 at New York.

However, it must be recognized that Miami has been the major gateway for Latin American air traffic since the inauguration of Pan American's service in 1927. New York has been an international gateway for air traffic

only since the inauguration of Pan American's transatlantic operations, which the war has not permitted to reach full development.

Tampa is also suggested as a gateway for certain of the Latin American routes. The population of Tampa was approximately 108,000 in 1940, although Hillsboro County had a population of 180,000. The city has 8,859 residents of Latin origin and has maintained close relations with Cuba and Latin American countries. In 1936 the total steamship passenger traffic between Tampa and Cuba amounted to 11,422; in 1937, 12,147. Tampa has two class 4 airports, Henderson-Hillsboro County Airport and Peter O. Knight Pinellas County Airport, which could serve both Tampa and St. Petersburg.

New Orleans is a terminal for Pan American's temporary route from Guatemala City and Merida. It is an important Gulf port serving the entire Mississippi Valley. It had a population of 385,000 in 1940. The city has a substantial Latin population and a number of the Latin American countries have consular offices there. It is a terminal for four domestic airline carriers, Chicago and Southern, Delta, National, and Mid-Continent, and in addition is on Eastern's route between the east coast and Texas. Passport data for 1938 indicate that a total of 4,034 tourists used the port of New Orleans for travel to Latin America, exclusive of Cuba, Haiti, and Nicaragua. In 1939 New Orleans handled 2,041,808 tons of imports as compared with 231,449 for Houston and 611,474 for Mobile, and 2,123,066 tons of exports as compared with 1,104,795 for Houston and 758,781 for Mobile. New Orleans asks to be designated as a terminal for service to Mexico City, Guatemala City, and Balboa, to Havana and Balboa, and to San Juan.

The city of Houston intervened to ask that it be given direct air service to the important Latin American cities. In its behalf the Chamber of Commerce of Houston submitted data relative to the city's relations with Latin America. Houston is the largest city in Texas, having a population of 384,000, and is an important Gulf coast port. It is the terminal point for Chicago and Southern's route from Memphis, Tenn., and is served by Eastern and by Braniff. It is also an authorized terminal on Essair's route from Amarillo, Tex. Houston is also an important terminal for several railroads. In 1938 the port of Houston handled imports from Latin America amounting to $5,828,000 and exports amounting to $16,303,000; for 1939, $13,332,000 and $18,397,000, respectively. In 1940 the combined ports of Houston and Galveston had exports totaling 3,984,000 tons as compared with 3,351,000 tons for New Orleans.

Houston placed considerable reliance on its position as a center for the petroleum industry in Texas and the substantial movement of traffic and trade to the Latin American oil fields. Testimony was introduced to the effect that exchanges of personnel between the oil companies of the area adjacent to Houston and Latin American countries would result in substantial movement of passenger traffic. For example, in 1938 Pan American carried 806 persons to Venezulea for the account of the Texas Oil Company, and in 1940, 250 persons to the Colombia oil fields for the account of the Humble Oil and Refining Company. A substantial increase in the petroleum industry traffic is anticipated. Testimony was adduced to the effect that the Humble Company, with approximately 14,000 employees in the Houston area and about 3,000 employees in Venezuela and Aruba, estimates that about 500 employees and their relatives would use the projected direct service annually. The Texas Com-

pany estimates that approximately 100 persons from the Houston area would use the direct service each year. A survey of all the Texas oil companies indicated that 1,571 round trips per annum might be expected between Houston and the Latin American area in the postwar period. Houston contended that an important saving in time and expense would result from the establishment of direct service from Houston to the South American oil fields.

Los Angeles was suggested as a terminal for routes from Mexico City. The metropolitan area had a population of 2,785,000 in 1940. There are five trunk-line airlines operating into Los Angeles with a total of more than 374,472 passengers during 1943, an increase of more than 26 percent over 1942. The movement of passengers between Los Angeles and Mexico has been increasing: CMA carried 500 to 600 passengers in 1934, 1,661 in 1938, and 2,573 in 1939. Almost 90 percent of this traffic consisted of through passengers between Los Angeles and Mexico City. In 1937, 3,463 persons traveled by steamship between Los Angeles and San Francisco and the west coast ports of Mexico, 1,559 between Central American ports and Los Angeles and San Francisco, and 6,551 between these ports and the Canal Zone.

Other cities suggested as gateways for Latin American travel were Tulsa, Okla., Kansas City, Mo., Dallas and San Antonio, Tex., Jacksonville, Fla., and San Diego, Calif. Exhibits were introduced to show that each city has interests in the Latin American trade which would be benefited by fully adequate air transportation service. For example, it was urged that the heavy movement of naval personnel between the Canal Zone and San Diego would justify the latter's inclusion on a west coast route to Latin America.

Service to Mexico.

Pan American is the only United States-flag carrier permanently certificated to operate into Mexico. It holds a certificate authorizing service between Brownsville and Mexico City via Tampico. Thus in the past Brownsville has been the principal gateway for travel from the United States to Mexico City. Pan American has also provided service between Miami and Mexico City through a connection at Merida with its Mexican subsidiary, Compania Mexicana de Aviacion (CMA). Under a temporary certificate, it operates between New Orleans and Guatemala City via Merida, providing a connecting service from New Orleans to Mexico City through Merida. Direct service from Los Angeles to Mexico City is provided by CMA, under a permit issued pursuant to the "grandfather" provisions of the Act. Braniff and Eastern connect with Pan American at Brownsville for service to Mexico City. Braniff has a certificate authorizing operations to Laredo and a temporary authorization to operate to Nuevo Laredo, where it connects with Aerovias Braniff, controlled by Mr. T. E. Braniff. Prior to the organization of the latter company, Braniff interchanged traffic with CMA. Lineas Aereas Mexicanas, S. A. (Lamsa), a Mexican carrier controlled by United, operates to Nogales, Ariz., and Aero Transportes, S. A., operates to Brownsville under temporary permits issued by the Board. Aerovias Braniff also holds permits from the Mexican Government authorizing it to operate from Mexico City to Los Angeles and Miami and to the border points of Matamoros, Neuvo Laredo, Nogales, Mexicali, and Tijuana; thus far its service has been limited to Nuevo Laredo.

In this proceeding, service on a permanent basis is proposed between the United States and Mexico City, via

Los Angeles, Laredo, Fort Worth-Dallas, El Paso, Houston, New Orleans, and Miami. Pan American and Western seek authority to operate to Mexico City from Los Angeles; Braniff proposes service to Mexico City from Laredo; Eastern, Pan American, and Chicago and Southern are proposing service from Houston and New Orleans to Mexico City; and Colonial, AGWI, and National propose service from Miami. American is asking that its temporary certificate from Fort Worth-Dallas and El Paso be replaced by a permanent certificate.

It is clear that there is a substantial and increasing community of interest between Mexico City and the United States. In 1937 there were 165,889 one-way tourist trips between Mexico City and the United States. Data respecting hotel registrations and long-distance telephone calls from Mexico City and Monterrey demonstrate the substantial community of interest existing between these cities and the United States. There has been a substantial increase in air traffic between the United States and Mexico City. In 1940 Pan American carried 6,730 passengers through the Brownsville gateway. In the same year CMA carried 1,566 passengers through the Los Angeles gateway. The corresponding figures for 1941 were 8,907 and 2,690. From January through November 1943, Pan American carried 9,172 passengers between Mexico City and Brownsville, and during the first 9 months of 1943 CMA carried 3,289 on its Los Angeles route. In 1943 American carried 11,117 passengers on its operations between Fort Worth-Dallas, San Antonio, Monterrey, and Mexico City and 10,354 passengers on its El Paso-Monterrey-Mexico City operation. Although they reflect the abnormal conditions resulting from wartime operations, these figures are indicative of the potential importance of the Mexico City traffic.

A similar increase is evidenced in the volume of mail moving between the United States and Mexico City. Data

submitted by Pan American show that the air mail outbound from the United States increased from 26,372 pounds in 1938 to 41,353 pounds in 1942.

Data with respect to the movement of air passengers in 1941, rail passengers for the year ended September 1941, and hotel registrations for the same period show that the Middle Atlantic states, the North Central States, the South Central states, and the Southwestern states originate a substantial volume of traffic for Mexico City. The 1941 air traffic data show 28 percent from the Middle Atlantic states, 15 percent from the North Central, 13 percent from the South Central, and 27 percent from the Southwestern.[22] The only permanent United States air carrier service between the United States and Mexico City is via Brownsville. The potential volume of traffic indicates the desirability of the establishment of additional and direct service from the United States to Mexico; the origins and destinations analysis indicates the appropriate gateways.

American holds a temporary wartime certificate authorizing operations between Mexico City and the intermediate point Monterrey and (a) beyond Monterrey the terminal point El Paso, and (b) beyond Monterrey the intermediate point San Antoio, and the terminal point Fort Worth-Dallas, subject to the condition that San Antonio shall be served only on flights originating or terminating at Mexico City and at Fort Worth-Dallas, or at points north thereof.[23]

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[22] On the basis of rail passengers these areas originated the following percentages of travel to Mexico City: Middle Atlantic, 14 percent, North Central, 26 percent; South Central, 45 percent; and Southwestern, 13 percent.

[23] *American Air., Temporary Mexico City Operation*, 3 C. A. B. 415 (1942); *American Air., San Antonio-Monterrey-Mexico City*, 4 C. A. B. 647 (1944). This certificate is to continue in effect until the Board shall determine that the need for the service in the interest of national defense has terminated.

American requests that its temporary certificate be made permanent by removal of all of the provisions limiting its term, or in the alternative, by the issuance of a new permanent certificate of public convenience and necessity for the Mexico City route. American also takes the position that the public interest would be better served if the restriction on service to San Antonio were removed.

American was granted a permit on October 25, 1940, by the Mexican Government authorizing it to engage in international air transportation between Mexico City and the United States. This concession is for a period of 10 years with the right of renewal. The temporary certificate was issued to American by the Board on April 14, 1942, and scheduled operations were inaugurated on September 8, 1942. American's Mexican permit provided for the organization of a Mexican corporation, American Airlines de Mexico, S. A., for the purpose of owning, developing, and operating the ground facilities required for the Mexican service. This corporation owns and maintains all of the ground and other operating facilities in Mexico used by American in its operations.[24] American pays the Mexican company a fixed fee of $1,000 per month and the cost of the services performed by the lat-

[24] When American received its Mexican permit, airways facilities in Mexico were not comparable to standard airways within the United States. American installed the necessary radio-telegraph equipment to provide radio communications between all fields served by American and to provide for communications between Mexico and Fort Worth. To provide communications between aircraft and ground stations, radio-telephone equipment was installed at each airport and emergency field. CAA type radio ranges were installed at Mexico City, Guerrero, Victoria, and Monterrey to permit flights under instrument conditions. A radio-marker beacon was installed at the Actopan emergency field. American constructed a landing field at Monterrey consisting of two 100-foot-wide-hard-surfaced runways—one 4,300 feet and the other 4,830 feet in length—and three dirt landing strips, as well as beacons, boundary range, contact, and obstruction lights. It also constructed a terminal building and a hangar and service building at Monterrey. Intermediate fields were constructed at Victoria and Guerrero with the necessary landing strips and lighting.

ter in its behalf.[25] American's investment in its Mexican subsidiary as of May 31, 1944, was $980,192. Service to Mexico City was inaugurated by American on September 8, 1942, with one round-trip daily between El Paso and Mexico City and one between Fort Worth and Mexico City, using Douglas DC-3 equipment. Although authorized to conduct unlimited day-and-night instrument and over-the-top operations, American has limited its service to daylight hours. In this operation American's load factors increased from 31.6 percent for the last 4 months of 1942 to 74.6 percent for the calendar year 1943 and to 83 percent for the first 5 months of 1944. Passenger traffic has been almost equally divided between the west leg from El Paso and the east leg from Fort Worth. Cargo loads have increased from an average of 13 pounds of express and 12 pounds of mail per mile during the first 4 months of 1942 to 88 and 39 pounds, respectively, for 1943. The first 5 months of 1944 showed a further increase in cargo carried. A second round-trip schedule between Dallas and Mexico City was started on August 10, 1944. American proposes to continue use of DC-3 aircraft on this route until the DC-4, the DC-6, or other larger and more modern equipment becomes available. It estimates that postwar operations can be conducted at a profit with mail pay at 60 cents per ton-mile.

Braniff contends that historically it and Eastern have been the only domestic carriers having an interest in service to Mexico City and that until the establishment of American's Mexico City route, United States service was provided only through connections between Braniff, Eastern, and Pan American at Brownsville. Braniff argues that the grant of a permanent certificate to American will result in substantial diversion of traffic and

[25] The agreement between American and American Airlines de Mexico, S. A., dated September 1, 1942, was submitted to the Board under section 412 of the Act and was approved Sept. 2, 1943 (Order No. 2429).

revenue from its system. It asserts that the adverse effects have not been fully apparent during the period of American's operations because wartime conditions resulted in capacity loads for all carriers. On the basis of traffic data from October 1, 1940, to September 30, 1942, it estimated that as a result of American's operations its revenue could be cut by $557,439 per annum, or about 23.92 percent of its total passenger revenue. It further estimated that the actual diversion would be at least 50 percent of this amount. Clearly the continued operation of American's Mexico City route will result in a loss of some Mexico City traffic previously carried by Braniff. Also the continuance of American's Mexico City operation will result in that company obtaining some traffic which would otherwise move over the routes of Eastern and Pan American. It is necessary therefore to weigh the adverse effect of the American service upon other carriers in the light of the benefits accruing to the public from the proposed service.

American's record of operation under its war-time certificate is excellent. During this period it has maintained an efficient service and has developed a substantial volume of traffic between the United States and Mexico. It has thus demonstrated its ability to develop the traffic potential of routes between these countries.

Approval of the American application to make permanent its certificate authorizing service between Fort Worth-Dallas and Mexico City would make possible a single-carrier direct service for many of the major traffic-producing areas of the country. American has an extensive sales organization, with stations, ticket offices, and traffic agents located in many of the largest traffic-generating points in the country. With these facilities it is possible to put forth promotional efforts toward the development of traffic to and from Mexico City which

would result in a maximum development of the traffic potential between these United States cities and Mexico. This factor will ordinarily carry more influential weight in cases involving international air transportation than it would deserve in the domestic field in view of the difference in problems presented in the two fields of air transportation.

The extension of Braniff from Laredo to Mexico City, as hereinafter provided, will place that company in a position to attract to its system traffic to Mexico from points noncompetitive with American and to compete with American for a share of the traffic from competitive points. The extension of Eastern from New Orleans to Mexico City will enable that company to share in the heavy volume of traffic moving from the east. Similarly the extension of Pan American from Brownsville to Houston should make possible an effective connecting service between Pan American and Chicago and Southern.

Weighing the foregoing factors, we conclude that the public convenience and necessity require the service proposed by American between Fort Worth-Dallas, San Antonio, Monterrey, and Mexico City.

In support of its contention that it should be permitted to serve San Antonio without restriction, American asserts that 40 percent of all air traffic to and from that city is to and from points on American's system. However, we do not believe that the service to the public would be so improved as to justify the additional diversion which Braniff's system would suffer by eliminating this restriction. We shall therefore authorize American to serve San Antonio as an intermediate point between Fort Worth-Dallas and Monterrey, subject to the condition that service to San Antonio shall be provided only on flights originating or terminating at Mexico City and

at Fort Worth-Dallas, or points north of Fort Worth-Dallas.

Several applicants seek routes between Miami and Mexico City. The historical volume of traffic between these points is quite light, Pan American carrying in 1941 only 6 passengers per day between Havana and Merida, of which only 3 were destined to or had their origin in the United States. The 1939 traffic data indicate that only 7 percent of the total United States-Mexico traffic moved between Florida and Mexico. In view of the relatively small volume of traffic, we cannot find that the public interest requires the establishment of such a route at this time.

Pan American, Eastern, and Chicago and Southern have applied for routes from New Orleans and Houston to Mexico City. The air traffic from the eastern part of the United States has historically moved via the Brownsville gateway utilizing Eastern, Braniff (by connection with American at Fort Worth-Dallas), and Pan American. Traffic data for the year 1938 indicate that there were approximately 36 passengers daily in each direction moving between the North Atlantic and Midddle Atlantic states and Mexico. During the same period there were about three passengers daily in each direction between the South Atlantic states and points in Mexico and 16 passengers daily between the North Central states and Mexico. If they all moved by air these passengers would under the present pattern of permanent certification be required to utilize the Brownsville gateway.

The Board is instructed by the Act to provide the country with that pattern of air transportation which is best adapated to the present and future needs of the foreign and domestic commerce of the United States, of the

Postal Service, and of the national defense. It is inevitable that the growth of air transportation will affect the existing services and gateways.

Brownsville has been an international gateway because of its border location rather than because of its commercial importance or its ability to generate a substantial volume of traffic.

Houston is a large city and has a substantial traffic-generating capacity. In addition, it is a focal point for transportation facilities and has excellent accommodations for passengers who may have missed connections or who may be required to wait over because of weather conditions. Houston is served by Eastern, Chicago and Southern, Braniff, and Essair, and each of these carriers will afford excellent connecting service for passengers originating at interior points and destined for points in Mexico served by Pan American. Extension of Pan American from Brownsville to Houston involves an authorization of only 314 additional route miles, and although such a service will parallel the routes of Braniff and Eastern between these points and result in some diversion of traffic now carried by these companies to Brownsville for connections with Pan American, we find that Houston is better suited to serve as an international gateway and that the public convenience to be served outweighs the diversionary effect upon Braniff and Eastern. We do not believe, however, that Pan American should be permitted to divert local domestic air traffic between Brownsville on the one hand and Corpus Christi and Houston on the other, and our amendment of its certificate will contain a restriction which will prevent this carrier from engaging in traffic of this type.

As has been pointed out, Eastern and Chicago and Southern are also applicants for routes from Houston to Mexico City. The extension of Braniff's route from Laredo to Mexico City will meet the traffic needs of the midwestern area while the extension of Eastern's service from New Orleans to Mexico City will serve the eastern seaboard. Under the circumstances there is no justification for extension of Eastern or Chicago and Southern from Houston to Mexico City duplicating Pan American between these points. We find, therefore, that the public convenience and necessity do not require these routes.

Direct service is also proposed between New Orleans and Mexico City by Pan American, Eastern, and Chicago and Southern. The establishment of a direct route between these points would involve an authorization of approximately 928 new route miles and would effect a saving of approximately 160 miles over the present connecting service from New Orleans via Brownsville or via Houston under our authorization herein. A similar saving would be achieved for passengers from points in the east, such as Boston, New York, and Washington, destined to Mexico City through the Brownsville gateway. The proposed route would be about 281 miles shorter than American's service authorized herein via Fort Worth and Dallas. Such a route considered in connection with existing routings from New Orleans to the northeast would constitute the most direct air route between the eastern seaboard and Mexico City. Data with respect to the historic flow of traffic between the United States and Mexico City hereinbefore referred to show that the northeastern and Middle Atlantic areas of the United States have developed almost 33 percent of the total traffic to Mexico and that the South Atlantic and Florida areas developed about 9 percent. While we recognize that the

establishment of a direct route from New Orleans to Mexico City will result in diverting a substantial portion of the traffic heretofore carried by existing routes via the Brownsville gateway this fact is outweighed by the benefits which would accrue through the establishment of a more direct service. We therefore find that the public convenience and necessity require the establishment of a direct route between New Orleans and Mexico City.

There is, however, no justification at the present time in authorizing more than one United States air carrier to operate between these points. It is therefore necessary to determine which of the three applicants before us would best meet the public interest. As has been indicated, the primary benefit which will accrue for this route is the establishment of direct service between Mexico City and the east. Neither Chicago and Southern nor Pan American is in a position to meet this need to the same extent as is Eastern. The Chicago and Southern system serves primarily the midwestern area along the Mississippi Valley while Pan American's service would not extend north of New Orleans. Eastern on the other hand operates an extensive route system serving all of the major cities of the east, including such important metropolitan centers as Boston, New York, Philadelphia, Baltimore, Washington, Atlanta, and Birmingham. The selection of Eastern would make possible the operation of a single-carrier service between Mexico City and virtually all of the major traffic generating areas of the east.

Manifestly the certification of Eastern to provide this service will have a serious diversional effect upon Pan American's route between Brownsville and Mexico City. A substantial part of the eastern traffic to and from

Mexico City heretofore interchanged between Pan American and Eastern at Brownsville will be diverted to the new route. This will, in all probability, mean a loss of more than 50 percent of the traffic heretofore carried by Pan American and this fact coupled with the proposed extension of Braniff to Mexico City and the establishment of American's temporary route from Fort Worth-Dallas, will largely limit Pan American to the carriage of through traffic moving to points south of Mexico City and to traffic generated at Brownsville, Corpus Christi, and Houston areas and connecting traffic at Houston.

In the present instance, therefore, we are presented with the choice between two courses. One would inflict a substantial diversion upon a particular route of Pan American while it served the public convenience and necesity of a large section of the United States which contributes a very large and substantial traffic to Mexico; the other would preserve the Brownsville-Mexico City route of Pan American against diversion and deny the public convenience which would be accomplished by the extension of the eastern system from New Orleans to Mexico City. The public interest must control our decision in choosing between these two alternatives. In view of the fact that the extension of Eastern will be affecting a route of Pan American which is primarily local in character and will have no material effect on Pan American's long-haul services, we conclude that the overriding public interest which will be served by the establishment of a single carrier service by Eastern should be controlling in the present instance. Traffic destined for points in Central America from the heavy traffic generating areas of the East will continue to utilize the more direct service afforded by Pan American between New Orleans and Guatemala City. We find therefore that the public convenience and necessity require service be-

tween New Orleans and Mexico City by Eastern and do not require that such route be operated by either Chicago and Southern or Pan American.

Braniff is an applicant for a route from Laredo to Mexico City via Monterrey. In support of its application it emphasizes the importance of Nuevo Laredo as a gateway for international traffic into Mexico. For the first 10 months of 1943, 43 percent of Mexican exports and 46 percent of all Mexican imports flowed through this city and during recent years more than 60 percent of United States tourists entering Mexico used the Nuevo Laredo gateway.

Braniff has historically had substantial interests in the Mexican travel through its connections at Brownsville with Pan American and more recenty through its connections with CMA at Nuevo Laredo. Approval of Braniff's proposal would provide a through service connecting Mexico City with the cities of Texas served by Braniff. The importance of Texas as a source of travel to Mexico is demonstrated by data showing that in 1942 about 52 percent of the total traffic movement between the United States and Mexico was generated in Texas. Braniff would compete with American for traffic from Fort Worth-Dallas and San Antonio and would provide service for 10 other cities of Texas. The Braniff service to Mexico would of course be competitive with that of American from the Chicago area. In addition, it would provide a direct single-company service from Colorado points and from Kansas City which would not be available over American. We find therefore that the public convenience and necessity require service between Laredo, Tex., and Mexico City, via Monterrey, by Braniff.

Pan American and Western seek authority to conduct operations between Los Angeles and Mexico City, Western proposing to stop at La Paz, Mexico, and Pan American a nonstop operation. The western leg of American's Mexican route, extending from El Paso to Mexico City via Monterrey, will also provide service between Los Angeles and Mexico City via its route No. 4 to El Paso.

At the present time the only direct service between Los Angeles and Mexico City is provided by Compania Mexicana de Aviacion (CMA), a Mexican company organized and largely owned by Pan American. This company has conducted operations between these points since 1936 pursuant to a permit issued by the Secretary of Commerce. It was issued a grandfather permit by the Board on May 29, 1941, authorizing service between Mexico City and Los Angeles via Hermosillo, Mazatlan, and Guadalajara.[28]

The record indicates that there is a substantial community of interest between California and Mexico City which would be served by the inauguration of a direct service by a United States air carrier between these points. The Overseas Air Service Patterns study shows that 31 percent of the travel from the United States to Mexico originates in the northwestern and southwestern sections of the country and would flow through the Los Angeles gateway. Of this traffic 27 percent was from the southwestern section. The record also shows that Los Angeles led among the cities of the United States in the exchange of telephone calls with Mexico City, that California was second in the number of tourist cards issued in 1940 for travel to Mexico and second among states from the standpoint of permanent residents to whom passports were issued for Latin American travel.

[28] *Compania Mex. de Aviacion, Los Angeles-Mexico City Op.*, 2 C. A. B. 714 (1941).

The Overseas Air Service Patterns study indicates that on the basis of 1938 travel data about 43 passengers per day would use the Los Angeles gateway for travel to Mexico City. Pan American estimates that an average of almost 100 passengers per day may be expected to utilize the direct service. The foregoing data are convincing that the public convenience and necessity require direct service by a United States air carrier between Los Angeles and Mexico City, and we so find.

The American route meets a public need in providing service connecting the important cities of Arizona and New Mexico with Monterrey and Mexico City, with which they have a substantial community of interest, and in providing an indirect service between Los Angeles and Mexico City. This route will also provide service through connections at El Paso for the cities served by Continental north to Denver. In view of our approval hereinbefore of American's Fort Worth-Dallas-Mexico City route, service to El Paso will involve only the 560 new route miles between that city and Monterrey. No additional stations or other installations will be required for this service. We find that the El Paso-Monterrey-Mexico City service of American is required by the public convenience and necessity. However, we are unable to agree with the contention of American that this route will meet the public need for a direct Los Angeles-Mexico City service. The direct route between these cities is 1,564 miles as compared with 2,095 for American under instrument conditions and 1,870 under day-contact conditions.

The Board (Member Lee dissenting in favor of Western) concluded that Pan American should be issued a certificate authorizing service between Los Angeles and Mexico City effective for a period of 2 years to become

unlimited upon fulfillment of certain conditions.[27] In view of the President's determination with respect to this route, an appropriate order will be entered directing the issuance of a certificate to Western authorizing service between Los Angeles and Mexico City, via San Diego and La Paz.

Service to Bermuda.

Pan American holds a certificate authorizing operations between New York and Bermuda. In addition it is authorized by its transatlantic certificate to make an intermediate stop at Bermuda on its route to Europe when weather conditions necessitate. British Overseas Airways Corporation holds a permit from the Board authorizing it to engage in air transportation between New York and Bermuda. Prior to the war these companies were engaged in air transportation between these points.

In the present proceeding Colonial, American Overseas, AGWI, and Mooremack have filed applications seeking authority to provide service between the United States and Bermuda. The Colonial application contemplates establishment of service to Bermuda from New York and Norfolk. American Overseas seeks a certificate authorizing service between New York and Bermuda. The AGWI and Mooremack applications contemplate service to Bermuda as a part of their proposed operations to points in the Caribbean area and South America.

There has always been a substantial community of interest between Bermuda and the United States, the loca-

[27] If before the expiration of the 2-year period the Board found that Pan American did not control a foreign air carrier operating over this route, the certificate was to remain in effect without limitation as to its duration.

tion and climate of the Islands lending themselves particularly to the tourist traffic. This interest has resulted in a relatively heavy movement of passenger traffic as indicated by the fact that in 1938 the sea passenger traffic between the United States and Bermuda was approximately 115,000, almost one-third of the total United States sea passenger traffic to all Caribbean and Latin American countries. This figure does not include the cruise traffic touching Bermuda which in 1938 amounted to 25,000 persons.

Pan American objects to the certification of additional United States air carrier service from the United States to Bermuda on the ground that the potential volume of traffic between these points is not sufficient to support the operation of such a service and at the same time insure the utilization of large, fast, economical aircraft. Pan American argues that as a British possession it is certain that a large part of the traffic to be carried between the United States and Bermuda will utilize the services of the British carrier and that there is insufficient traffic to justify an additional service. It contends that the potential volume of traffic to Bermuda is necessarily limited by the hotel facilities available and that the travel being almost entirely recreational it is highly seasonal. Data were submitted of record to show that the volume of sea traffic in August was more than four times as great as that in November and nearly three times as great as that in December and January. While it is true that in the past there have been extreme seasonal fluctuations in the movement of traffic to Bermuda there is every indication that with the improvement of transportation Bermuda will become of increasing importance as a year-around resort.

Although Pan American holds a local certificate authorizing service between the United States and Bermuda and operates local flights between these countries the operations of this carrier are of a world-wide nature and its Bermuda service constitutes a relatively small segment in a larger operation.

The record shows that the 1941 volume of air traffic between the United States and Bermuda amounted to only about 5 percent of the total 1938 sea-air traffic as compared to 35 percent for the Caribbean and Latin American areas. These data indicate that the air traffic of the Bermuda route has not been fully developed by the existing air services. Such a development we believe can be attained only through the maintenance of a system of vigorous competitive services provided by a United States air carrier. The establishment of frequent, fast, and economical service by air should result in substantial increases in the number of annual visitors to Bermuda. The estimates submitted in the record in this case vary widely. Pan American estimated that there would be a total of 72,000 passengers outbound by air per year to Bermuda; American Overseas estimated 39,000 passengers; and AGWI estimated 23,031 passengers. It is of course impossible to predict with any accuracy what the future may see with respect to air traffic between any two points. However, we are convinced that the volume of traffic which will be developed in the future will be sufficient to justify the operation of an additional United States air carrier between the United States and Bermuda.

Although historically the bulk of the traffic for Bermuda has originated in the area which would be most advantageously served through the New York gateway there is a substantial area with a large traffic potential

which would be provided an improved service by a route originating at Washington, D. C. This city is about 830 miles from Bermuda and the establishment of a direct service would not only result in a substantial mileage saving over New York for traffic originating in the city but also for traffic originating in the States of Delaware, Maryland, Virginia, West Virginia, Illinois, Indiana, Kentucky, Missouri, and the southeastern States. Historically this area has developed about 7.36 percent of the Bermuda traffic. In view of the foregoing considerations we find that the public convenience and necessity require service by a United States air carrier between Washington, D. C. and Bermuda.

Although AGWI's plan of operation contemplates operation of local New York-Bermuda flights both this company and Mooremack applied for authority to render service between New York and Bermuda as a part of their proposed operations to the Caribbean area and to South America. For reasons hereinafter set forth we have concluded that the public convenience and necessity do not require the services thus proposed nor are we able to find that the operation of the approximately 800 miles involved in the route between New York and Bermuda is of sufficient scope to permit its award to either of these companies as an independent operation. The primary importance of establishing additional service between these points is in meeting the needs for a local New York-Bermuda service. One of the arguments by American Overseas in support of its proposed service to Bermuda is the importance of this point in connection with its overseas operations. American Overseas would necessarily be primarily interested in the development of its long-haul service to European points and we believe therefore that the additional United States service should be placed in the hands of a company whose in-

terest will be devoted primarily to the development of the local traffic.

Colonial, the only other applicant for service between the United States and Bermuda, is presently authorized to operate between Montreal and Ottawa on the one hand and New York and Washington on the other via various intermediate points in the United States. The award of a Washington-Bermuda route to Colonial would enable that company to provide through single-company service capable of handling the substantial volume of traffic moving between the Canadian points and Bermuda. The record shows that in 1937, 14 percent of Bermuda's trade was with Canada and 43.1 percent was with the United States. Colonial is a comparatively small carrier whose operations have been limited to providing service between this country and Canada; and it has experience in the movement of international traffic through its Canadian operations. Although Colonial did not specifically apply for authority to conduct operations between Washington and Bermuda, it has filed an application for a route between co-terminals New York, Norfolk and Bermuda. Its application contains a provision that it is subject to such additions, extensions, modifications, and alterations as the Board may find the public convenience and necessity to require, and via any intermediate point or points along or near the routes proposed by the Board. Under this provision it is clear that the Board is empowered to grant the route to Colonial. We find therefore that the public convenience and necessity require the establishment of service between Washington and Bermuda by Colonial and that it is fit, willing, and able to provide this service.

The Board (Member Lee dissenting in favor of the certification of Colonial between New York and Ber-

muda) found that the public convenience and necessity did not require service by an additional United States air carrier between New York and Bermuda. As heretofore stated, the President has determined that such a service should be established. The reasons set forth above as a basis for our selection of Colonial for the Washington-Bermuda route over other applicants apply with equal force to the New York-Bermuda service, and we shall therefore enter an appropriate order directing the issuance of a certificate to that carrier authorizing such service.

Caribbean Route Pattern.

Caribbean Service.—The Caribbean area, embracing the Lesser and Greater Antilles, Venezuela, and Colombia on the north coast of South America and the countries of Central America including the Canal Zone, affords the most promising field in this proceeding for the early expansion of air transportation. Air transport has unusual advantages in speed and flexibility over surface transport. Expanding economic and cultural relations insure a continued growth in travel and trade. As previously pointed out, approximately 38 percent of the total international travel between the United States and Latin America is in the Caribbean area and about 80 percent of that travel is of United States origin.

Pan American is now the only certificated United States air carrier conducting operations in this area. It operates between Miami and Port of Spain via points in the Greater and Lesser Antilles; between Miami and Merida via Havana; between Miami and Balboa and Barranquilla via Cienfuegos and Kingston; and between Ciudad Trujillo and La Guaira. Pan American also holds a temporary certificate for service between New Orleans

and Guatemala City, via Merida. At Guatemala City this service connects with its route from Mexico City to the Canal Zone. An extension of this route from the Canal Zone follows the north coast to Port of Spain where a connection is made with the line extending down the east coast of South America.

There are numerous proposals for the establishment of new service between the United States and the Caribbean area. Some applicants propose service from Atlantic seaboard points, including New York, Washington, Norfolk, Charleston, and Miami, to Nassau, San Juan, other points in the Caribbean, and the north coast of South America. Additional service is also sought from Atlantic coastal points to Balboa, via alternate routes utilizing Miami, Nassau, or points in the Caribbean as intermediate stops, and new services are also proposed from the Gulf coast cities to Tampa, New Orleans, and Houston to Central America, the Canal Zone, and to Havana and San Juan.

Havana, San Juan, and Balboa are focal points around which the various proposals center. Havana has historically been important for United States travel and trade. San Juan and Balboa are points in United States territory and, therefore, develop a substantial traffic volume to the United States. Balboa is also an important traffic point by reason of its strategic location in the Panama Canal Zone. San Juan, the most important city on the island of Puerto Rico, has close commercial and governmental relationships with this country, which require convenient, rapid transportation. Traffic data, previously cited, disclose that in 1938 there were 13,680 first-class and cabin-class sea passengers between the United States and Puerto Rico and 1,306 air passengers. In 1941, there were 4,182 air passengers. The war-time

curtailment of surface transportation contributed to a substantial increase in traffic; 13,449 passengers traveled by air between the United States and San Juan during the first 11 months of 1943. The first-class mail movement between the United States and Puerto Rico also reflects a substantial community of interest. A total of 135,001 pounds of first-class mail and 45,276 pounds of air mail moved between the United States and Puerto Rico during the year ending June 30, 1940.

The importance of New York as a source of travel to the Latin American area has been clearly demonstrated. Passport data indicate that approximately 42 percent of the total traffic to Latin America originates in the North Atlantic and Middle Atlantic states.[28] Analyses of hotel registrations indicate that about 65 percent of the traffic to San Juan originates in the North Atlantic and Middle Atlantic states. The present route between New York and San Juan via Miami is 2,209 miles and involves a change of carriers. The direct flight distance is 1,612 miles, a difference of 597 miles.

The historical volume of traffic between New York and San Juan and the general community of interest between Puerto Rico and the northeastern United States lead to the conclusion that a direct service is required to meet a public need. If operated in conjunction with the present service from San Juan to Rio de Janeiro and Buenos Aires, via Port of Spain, this route would also effect a substantial saving in mileage and time between New York and points south of San Juan.

Eastern objects that the establishment of a direct route between New York and San Juan would have a destruc-

[28] These passport data relate to all of Latin America. They are, of course, not a reliable index to travel to Puerto Rico because passports are not required of United States citizens visiting the island.

tive diversionary effect upon its Boston-Miami route. No detailed estimates with respect to the extent of potential diversion were submitted. An exhibit was submitted showing that for the three months of May, June, and July, 1944, 12,548 passengers boarded Eastern's planes at Miami; 3,438, approximately 27 percent, were received from Pan American. Traffic from Havana, the Bahamas, the Canal Zone, Kingston, and Barranquilla would not be subject to diversion as a route via Miami would provide a more direct routing. Likewise traffic from the Caribbean region destined for points on the Eastern system south of New York such as Atlanta, Savannah, Charlotte, Birmingham, Memphis, and Louisville, would not be subject to diversion. Even though some diversion will undoubtedly be suffered by Eastern as a result of the establishment of a direct New York-San Juan route, the substantial public benefits in the form of improved service to the traveling public are so great as to be compelling. We find, therefore, that the public convenience and necessity requires the establishment of a route between New York and San Juan.

Washington, D. C., Philadelphia, Norfolk, and Charleston have also been proposed as points to be included on routes to Latin America. Evidence with respect to the economic characteristics of these cities and data bearing upon their traffic characteristics have been set forth hereinbefore.[29] As pointed out above, the principal objective of the direct service between New York and San Juan is to obtain a saving of almost 600 miles on the flights between these points accommodating the very substantial volume of traffic generated in the New York area and the area which would be served through the New York gateway. The inclusion of the additional points proposed

[29] Supra, pages 150 and 151.

would, of course, result in reducing the time saving on flights between New York, San Juan, and South America, not only because of the additional time required to make the stops, but also because of the additional mileage involved.[30]

As previously noted the record indicates that approximately 42 percent of the traffic moving to San Juan or the area to the south has its origin in the Northeastern and Middle Atlantic states and would be served through the New York gateway. Only about 5 percent of the traffic moving between the United States and San Juan and points beyond in Latin America is developed in the South Atlantic states and Florida with only about 3 percent developed in the South Atlantic area. Traffic from other areas would in all probability move through the Houston, New Orleans, or Miami gateways. Other data of record showing hotel registrations in San Juan indicate that an even greater portion of the traffic volume moving between the United States and San Juan is developed in the North and Middle Atlantic States area.

We do not believe that the traffic volume which would be benefited by the inclusion of additional stops on the New York-San Juan route is sufficient to justify the additional time and mileage which would be involved. Philadelphia and Washington will be afforded improved service to San Juan and South America through connections at New York with the new route granted to Pan American. There are at present two carriers operating between Washington and New York via Philadelphia providing numerous schedules. Norfolk and Charleston will be provided service to San Juan and points beyond

[30] Inclusion of Philadelphia would increase the distance between New York and San Juan about 60 miles, Norfolk 100, Washington 170, and Charleston 360.

by National to Miami where connections will be made with Pan American or to Havana where connections will be made with another service authorized herein to San Juan and other Caribbean points. Charleston will also be afforded service by Eastern to Miami. Accordingly, we find that the public convenience and necessity do not require designation of Philadelphia, Washington, Norfolk, and Charleston as intermediate points on this route.

Application for additional service between Miami and San Juan were denied by the Board (Member Lee dissenting in favor of National), but in view of the determination of the President with respect to this route, an appropriate order will be entered directing the issuance of a certificate to Eastern authorizing that carrier to operate between Miami and San Juan.

Havana is a very important point for United States traffic. Prior to the war air traffic between the United States and Havana was more than four times greater than that between the United States and any other city in Latin America. From 1940 to 1941, the Miami-Havana traffic averaged 146 passengers per day. In the year 1938, 122,291 first-class and cabin-class passengers and 31,228 air passengers traveled between the United States and Cuba. These figures do not include cruise passengers. In 1941 there were 55,622 air passengers between the United States and Cuba. Mail data also show a substantial community of interest between the United States and Cuba: some 222,920 pounds of first-class mail moved by sea and 41,110 pounds by air to Cuba for the year ending June 30, 1940.

The only United States air service between Miami and Havana is provided by Pan American on its route to Merida. In view of the substantial volume of traffic

moving to Havana and the close relationship between Cuba and the United States, we conclude that additional direct United States service from Miami to Havana is required by the public convenience and necessity.

Direct service is also proposed between Tampa and Havana. The community of interest which Tampa has with Havana and other Caribbean points has already been cited. In addition, a direct route between Tampa and Havana would be of substantial benefit to passengers traveling from the eastern seaboard to Havana. These passengers naturally flow through Jacksonville, and a Jacksonville-Tampa-Havana routing would effect a saving for them of 47 miles over the present Jacksonville-Miami-Havana routing. More than 60 percent of the traffic moving from the United States to Havana originates in the North Atlantic and Middle Atlantic States and would thus be benefited by the proposed Tampa-Havana route. The proposed route is only 338 miles long as compared to 433 miles for the present Tampa-Miami-Havana routing. This saving of 95 miles would benefit traffic from the North Central states, which originate about 21 percent of the traffic moving from the United States to Havana. In view of these substantial benefits, we find that the public convenience and necessity require the establishment of a direct route between Tampa and Havana. The Board of County Commissioners of Pinellas County, Fla., intervened to urge that the Pinellas County Airport be designated as a point to be served on routes to the Caribbean area and South America. Exhibits were introduced purporting to show the convenience of this airport to the Tampa area, including St. Petersburg and Clearwater. However, it is not the policy of the Board to prescribe in its certificates of public convenience and necessity the particular airport to be used by a carrier in providing the service required by the certificate. The

choice of airport is a matter for determination by the carrier subject to compliance with the provisions of section 238.4 of the Board's Economic Regulations.

Service is also proposed to Havana from Houston and New Orleans. These proposals must be considered in conjunction with the proposals to extend service from these points through the Caribbean islands to San Juan. Traffic from Houston, New Orleans, and points which would be served through these gateways must now move through Miami for connections with Pan American to either Havana or San Juan. It is here proposed that a route be established between Houston and New Orleans and San Juan via Havana and other important points in the Antilles.

In the New Orleans-Guatemala case[31] we had under consideration applications for the establishment of service between New Orleans and Havana. Upon the facts of record then before us we concluded that the public convenience and necessity did not require the proposed direct service between New Orleans and Havana.

We are here considering a proposed New Orleans-Havana service in the light of the substantially changed conditions in air transportation to which reference has already been made. In our prior opinion we were considering only the establishment of service between New Orleans and Havana. The present proceeding involves the establishment of a comprehensive new route pattern providing service between Houston and New Orleans on the one hand and Havana with two branches diverging from that point, one to Camaguey, Port-au-Prince, Ciudad Trujillo, and San Juan and the other to Kingston, Aruba,

[31] *Pan Am. Airways et al., New Orleans-Guatemala*, 4 C. A. B. 161 (1943).

Curacao, and Caracas. The proposed New Orleans-Havana service would effect a saving of about 360 miles with respect to traffic originating in the Houston and New Orleans areas and about 100 miles for traffic from the St. Louis area. In conjunction with Mid-Continent's route between Kansas City and New Orleans, the proposed route would save more than 250 miles on traffic from the Kansas City area. Considerable evidence was introduced as to the importance of San Juan in relation to the Gulf Coast ports and the desirability of establishing direct air connections from San Juan to Houston and New Orleans and other points which would be served through these gateways. The volume of passenger traffic between New Orleans and San Juan in the past has not been large. In 1938 only 946 passengers moved by sea between San Juan and Gulf coast ports, of which only 723 were first-class or cabin-class passengers. In 1939 there were 1,480 passengers between San Juan and the Gulf coast, of which 1,051 were first-class or cabin-class. Although the volume of passenger traffic between New Orleans and San Juan amounted to only about 6 percent of the total traffic between San Juan and the United States, about 32 percent of the total freight traffic between San Juan and the United States, about 32 percent of the total freight traffic between the United States and Puerto Rico moved through Gulf ports.[32]

While the historical travel volume has not been large, we believe that a direct service between New Orleans and the Antilles would develop a substantial volume of

[32] The decrease in steamship travel between New Orleans and Havana may be explained by the substantial reduction in the service provided by the steamship companies. After 1932 the United Fruit Company, which operated between New Orleans and Havana, reduced its schedules from two per week to one per week, and services by other carriers operating in this trade were withdrawn. Also Havana is served as an intermediate point on a long-haul operation, and as a consequence the development of the Havana passenger trade has not been as intensive as would otherwise be the case.

passenger traffic which has previously moved through other gateways because of inadequacy of surface facilities. The New Orleans gateway would provide improved service from the northwestern, southwestern, and south central sections of the United States. Analysis of sea and air travel for 1938, allocated according to passport data, indicates that an average of 20.21 passengers daily would utilize the New Orleans gateway outbound to Cuba, the Antilles and the east coast of South America. A study of the hotel registrations at Havana indicates that the potential travel on the New Orleans-Havana segment may be greater than is indicated by the passport data.

Houston, which is here proposed as a terminal for routes to Havana and San Juan, is important not only as a gateway but also as a source of traffic.[33] Houston lies 317 air miles west of New Orleans on Eastern's route No. 5, and although service to the Antilles could be provided through connections at New Orleans with the new route, that would involve a change of carriers. The designation of Houston as a co-terminal with New Orleans would save 62 miles on flights direct to points in the Caribbean and eliminate the necessity of maintaining connections at New Orleans. Although there is no evidence that there has been any large movement of traffic through Houston to the Caribbean in the past, this must be attributed at least in part to the absence of adequate transportation. A direct service should encourage the development of travel from the entire area served by Houston to the business and vacation centers in the Caribbean. If operated in conjunction with a route from Havana to Kingston, Aruba, Curacao, and Caracas, it would provide a direct routing for traffic from Houston and the adjacent areas to the important

[33] Supra, page 154.

oil territory of the Dutch West Indies and the north coast of South America between which a substantial volume of travel is expected, both from the oil producers and ancillary industries.[34] In addition to providing service between Houston and New Orleans on the one hand and Havana, Camaguey, Port-au-Prince, Ciudad Trujillo, and San Juan on the other, the route here under consideration would provide, through connections at Havana with National, an additional routing for passengers from the eastern part of the United States destined to points in the Caribbean which would be served. Operated in connection with the route from Havana to Caracas via Kingston, Aruba, and Curacao, hereinafter found required by the public convenience and necessity, it would also provide an additional routing for traffic from Gulf Coast points to the Canal Zone through connection at Kingston with Pan American's route to the Canal. On the basis of the foregoing considerations, we find that the public convenience and necessity requires the route between the co-terminals Houston and New Orleans and the intermediate points Havana, Camaguey, Port-au-Prince, and Ciudad Trujillo and the terminal point San Juan.

A route from Havana to Caracas via Kingston, Aruba, and Curacao will provide a direct single-carrier service conecting Houston and New Orleans with the oil centers of the Dutch West Indies and Venezuela. At present traffic from Houston and New Orleans must move over domestic air routes to Miami for connection with Pan American. The proposed route will save approximately 200 miles on flights between Houston and New Orleans on the one hand, and Aruba, Curacao, and Caracas on

[34] Approximately 44 percent of the oil and machinery and equipment exported from the United States in 1939 moved to South American countries. Texas produced over 46 percent of the oil field machinery and tools manufactured by the entire United States in 1939.

the other. It will also connect at Caracas for points along the north coast of South America. On the basis of 1938 sea and air travel allocated according to passport data, it appears that the Houston and New Orleans gateways will develop about 10 passengers daily outbound to Kingston, the Netherlands West Indies (Aruba and Curacao), and the north coast of South America. We also conclude that the public convenience and necessity requires extension of service from Havana to Caracas via Kingston, Aruba, and Curacao.

Permanent service is also proposed between New Orleans and Guatemala City, connecting at that point with existing services to Central America and the Canal Zone. In the *New Orleans-Guatemala City* case, *supra*, we found that such a route was required by the public convenience and necessity. However, owing to considerations of national interest, we further found that the certificate issued at that time should be limited to three years. Accordingly, Pan American was given a certificate authorizing service between New Orleans and Guatemala City for a period of 3 years. Pan American inaugurated service over this route on June 13, 1943, and from that date to November 30, 1943, it carried 1,882 passengers between New Orleans and Balboa and 1,842 passengers between other points. The traffic which has been developed as well as the substantial mileage saving [35] affirms our prior conclusion that the route is required by the public convenience and necessity. We find, therefore, that a permanent certificate of public convenience and necessity should be issued for the service.

Service is also proposed between Houston and Balboa via Merida and between Houston and Barranquilla via

[35] The airport to airport mileage between New Orleans and Guatemala City via Brownsville is 1,749 miles as compared with 1,074 miles between these points via Merida.

Merida. Establishment of a route between Houston and Balboa, as proposed, would effect a saving of about 557 miles for traffic originating at Houston as compared with the New Orleans-Guatemala City route. It would involve the establishment of about 1,085 new route miles. We do not believe that the potential traffic via the Houston gateway would justify a new route to the Canal Zone. However, by designating Houston as a coterminal point with New Orleans on a route to Guatemala City via Merida, traffic originating or moving through the Houston gateway would be afforded a service to the Canal Zone on such flights as may be conducted directly from Houston over a route approximately 244 miles shorter than via the New Orleans-Merida-Guatemala City route and about 140 miles shorter than via the New Orleans-Kingston route utilizing Pan American's service from the latter point to Balboa. In view of the importance of Houston as a source of traffic and of the fact that traffic originating in Texas, Oklahoma and the southwest generally would be benefited by service to the Canal Zone through the Houston gateway, we find that the public convenience and necessity requires that Houston be designated as a co-terminal point with New Orleans on a route to the Canal Zone via Guatemala City and Merida.

The direct route proposed between Houston and Barranquilla via Merida would result in a substantial saving in mileage for traffic moving between the terminal points. However, it would not aford any substantial improvement for traffic moving to Caracas and other points on the north coast over routes already found to be required. We find, therefore, that the public convenience and necessity does not require the proposed direct route from Houston to Balboa via Merida, or from Houston to Barranquilla via Merida.

Pan American is certificated to operate between Miami and Cristobal via Cienfuegos, Camaguey, and Kingston. At present service is conducted to Balboa in lieu of Cristobal under an exemption order. As heretofore mentioned Pan American also holds a temporary certificate authorizing a route between New Orleans and Guatemala City, which provides service to the Canal Zone through connections at Guatemala City with Pan American's route from Brownsville. Other connecting services to the Canal Zone from the United States are provided by CMA from Los Angeles and Laredo and by American from El Paso and Fort Worth-Dallas to Mexico City.

The great circle distance between New York and Balboa is 2,195 miles. Under present authorizations the route between New York and Miami is 2,353 miles, which could be reduced 100 miles by a nonstop operation between New York and Miami and between Miami and Balboa. It is apparent that justification of a through service over the long distance to the Canal Zone from New York cannot be based upon a saving in flight mileage.

The volume of traffic between the United States and the Canal Zone historically has been substantial and can be expected to remain heavy, not only because of the importance of the area to the national defense, but also because it serves as an important gateway to South America. In 1938 a total of 17,428 passengers moved by sea between the United States and the Canal Zone and Panama, of which 15,552 were first-class and cabin-class passengers. During 1941 a total of 4,724 passengers traveled by air between the United States and the Canal Zone over Pan American through the Miami and Brownsville gateways; there was an average of 11 passengers per day from Miami and 8 passengers per day from Brownsville to Balboa and points beyond. An average of 7 passengers per day continued to points south of Balboa.

A study of the air and first-class and cabin-class sea travel during 1938 indicates 20 passengers per day in each direction moving via the Miami gateway to Balboa and points beyond. Approximately 9 passengers per day in both directions would have their origination or destination south of the Canal. Some 16 passengers per day in each direction from the North and Middle Atlantic states and the South Atlantic states would utilize the Miami gateway.

While the data with respect to the historical movement of traffic indicate an appreciable volume of local traffic moving between the United States and the Canal Zone, the principal reason advanced for the establishment of additional service between these points is the improvement of through service from the United States to points along the west coast to South America and Buenos Aires.

For this reason the proposals for new routes between Miami and Balboa are considered in connection with the proposals for trunk-line air services through South America to Buenos Aires discussed at a later point in this opinion. It is indicated at that point that the Members of the Board are equally divided on the question whether the public convenience and necessity require the establishment of the trunk-line services at this time, and accordingly the applications for new routes between Miami and Balboa must also fail for want of favorable consideration by a majority of the Board.

Service between eastern United States and Balboa is proposed from New York via Charleston, Nassau, Cuba, and Kingston. Such a route would involve some 2,300 miles and offers little advantage over a route through Miami. Although there has been a substantial volume of traffic between the United States and Nassau, this traffic

is of a highly seasonal nature, and there is no indication of any appreciable volume from Nassau to the south. We find that the public convenience and necessity do not require the service proposed on a route to Balboa via the points above named.

AGWI, National, and Brainiff propose the establishment of routes along the north coast between Balboa and Port of Spain, paralleling the service of Pan American. Although there has been a comparatively heavy traffic flow along this route, most of the travel has been local. During 1941 when it operated a daily schedule on this route, Pan American carried 26 passengers daily between La Guaira and Barranquilla the heaviest traveled segment of the north coast route; 0.6 passengers, or about 2.4 percent, were to or from the United States. We find that on the present record there is no justification for a competitive service along the north coast.

Western seeks authority to operate between Los Angeles and Balboa via Mexico City and points in Central America. The record indicates that about 20 percent of the traffic between the United States and points south of Mexico City would be served by the proposed route. We find that the benefits which would accrue from the proposed direct Los Angeles service to Balboa are not sufficient to justify the duplication of 1,628 miles of the Pan American route between Mexico City and Balboa.

Selection of Carriers:

Considerations of the public interest and public policy rather than the advantages accruing to private interests are over the controlling consideration in all Board decisions. They are especially so in those decisions relating to the selection of carriers. The criteria which guide the

Board have been set forth in earlier decisions. It may, however, be helpful to review them here.

1. The basic criterion is the creation of an air transportation system which will be adequate to the present and the futuure needs of the foreign and domestic commerce of the United States, the postal service, and the national defense. This objective is important in the determination of the route pattern selected for service and in the selection of the particular carrier to provide service over the approved route. The future requirements of the foreign and domestic commerce are as important as those of the immediate present, for we are building an air transportation system for the future. It may sometimes happen that the carrier which can contribute the most in the short run may not be the carrier that can contribute the most in the long run, and where that choice is presented, long-run considerations should rule.

2. The inherent advantages of air transportation must, under our mandate from the Congress, be preserved and enhanced. The inherent advantages of air transportation are as various as the areas within which air transportation is conducted, as various as the services to be performed. Among the inherent advantages which are important in the present proceeding are the ability to provide rapid and direct service between cities separated by great distances where travel and communication by surface carriers have characteristically been handicapped; the ability to disregard surface barriers; the ability to provide a flexible service responsive to the changing volume and direction of travel; the ability to provide transportation over long distances without the necessity of investments which are directly proportional to the length of the route over which the service is performed, and the ability to provide additional vehicles operating

over the same route, whether under one management or under several, without the hazards of congestion, delay, and accident which beset carriers whose operations are confined to highways or tracks of limited capacity. The inherent advantages of air transportation accrue not simply to the traveler—business man or tourist who uses the plane—but also to the entire trade and commerce of the United States, which benefits from more direct and more rapid communication with the markets where we buy and sell.

3. The establishment and preservation of competition to the extent necessary to insure the sound development of an air transportation properly adapted to the needs of the threefold national interests described in the Act's declaration of policy is also a fundamental guide to our determination.

4. The applicant's ability to develop the service must be adequately demonstrated before a certificate can be granted. The Board must be satisfied that the applicant has adequate capital or is in a position to raise capital economically. It must also appear that it possesses or can create an organization qualified for the task which it undertakes; that it has access to the technical know-how to operate aircraft; that it is familiar with the problems involved in providing common-carrier transportation, and that the management is capable of assuring an economical and efficient operation.

It must appear that the applicant will have every possible incentive to develop to the maximum the potential market for air transportation. It is always pertinent to inquire where lies the primary loyalty of the enterprise and to determine whether there is any conflict between that primary loyalty and the full development of the air

transportation market. The importance of air transportation to the American public, to the traveler and tourist, to the business man, to those who export our products and to those who handle our imports, and to those who manage our foreign investments makes it impossible to overemphasize the importance of this factor in selecting the particular enterprise to be entrusted with the task of developing a new air transportation service.

In all new route cases much attention is devoted to the comparative costs which the applicants expect to incur in the development of the new service. Of course, it is essential to an economically sound enterprise that costs be kept at the lowest minimum consonant with adequate and efficient service. However, immediate costs are not necessarily controlling, as in that event that factor might conflict with other important statutory objectives.

5. The quality of the service supplied to the public and the convenience of the service to the public also guide the Board's decision. Wherever it is possible and in harmony with the other criteria of judgment, it is desirable to provide through services rather than a series of local services. In the interest of the over-all development of American Aviation, it is desirable to provide convenient connections between United States carriers which will facilitate movement over United States carriers. These considerations are not necessarily controlling inasmuch as they might in any particular instance conflict with other criteria of public interest for the largest carrier with the larger network would always seem to be in the position to give the maximum of through services. But other considerations being equal, as they often are, the decision may turn upon which of the rival applicants will provide a service of maximum convenience to the larger proportion of the traveling public.

New York-San Juan.—Five companies, Colonial, American Overseas, AGWI, Mooremack, and Pan American, seek authority to operate between New York and San Juan either as a separate service or as part of a more extended operation. Colonial, AGWI, and Mooremack propose a service to San Juan via Bermuda; Colonial suggests Nassau as an intermediate point. Grace might also be considered as a possible operator of the San Juan route although it did not specifically apply for authority to serve this point.

American Overseas filed a motion that the decision regarding the route between New York and San Juan be postponed for consideration with the South Atlantic Route case [36] wherein a number of routes are proposed via San Juan and South America. American Overseas contends that the economic justification for those routes is largely dependent upon the support of the New York-San Juan traffic. Establishment of service to San Juan from New York in this case would not necessarily preclude inclusion of San Juan as an intermediate point on a route to Africa if such a route is found required by the public convenience and necessity. Moreover, San Juan is of peculiar importance in establishing a service pattern between this country and Latin America. We shall therefore proceed to a decision on the New York-San Juan route in this case and to determine which of the several applicants is best qualified to perform service over that route.

Pan American is the pioneer United States air carrier to San Juan and to points beyond San Juan to Buenos Aires. It is fully experienced in the operation of long over-water flights; it is established as the leading air

[36] Docket No. 1171, et al. Oral argument in this case has been held and it is now before the Board for decision.

carrier in South America and hence is in an excellent position to develop the traffic potential to the South American countries which it serves. Inasmuch as it is not contemplated that we shall now extend another American carrier from San Juan down the north and east coasts of South America, Pan American is the only applicant that could provide single-company through service for the heavy traffic between New York and Rio de Janeiro and points to the south. Pan American would, of course, suffer a serious diversion of traffic if the New York-San Juan route were awarded to another carrier, for the direct New York, San Juan route will be approximately 600 miles shorter than the present connecting service from New York to San Juan by way of Miami.

American Overseas is also an established air carrier with considerable experience in over-water operations, some of which have involved flights from the United States to Europe and return by the southern route which has conditions approximating those that would be encountered in flying this route. It is in a position to secure adequate capital to develop the service. American Overseas is also experienced in the commerical phases of supplying air transportation service. However, it is not established as an operator in the Caribbean area, and it has had little, if any, commercial experience in the trade between the United States and Latin America. It would not be in as strong a position as Pan American to promote traffic between New York and San Juan and it would not be as efficient in exploiting the advantages of the short route for South American travelers, inasmuch as it has no established position in Latin America.

Colonial is an air carrier operating in the northeastern part of the United States, primarily between Washington and New York on the south and Ottawa and Montreal on

the north. Despite the fact that it is a small carrier, it is an air carrier of many years' standing, possessing an organization experienced in air carrier operations. Like American Overseas, however, it would not be in as strong a position as Pan American to exploit the full potentiality of the New York-San Juan service inasmuch as it would not extend beyond San Juan and only a relatively small proportion of the traffic moving to San Juan could be expected to originate on Colonial's line north of New York City.

In passing upon the qualifications of the three steamship applicants for the New York-San Juan route, Grace, AGWI, and Mooremack, it should be remembered that since several steamship and air carrier applicants are seeking a certificate for this route, the Board is presented not with the problem of determining the public interest where a single applicant appears; we are here called upon to make a choice among several applicants, including surface carriers and air carriers, on the basis of the fitness, willingness, and ability to fulfill the basic objectives of the Civil Aeronautics Act in the conduct of the proposed air operation.

The three steamship applicants for the San Juan route present cases which are similar in many respects. The steamship companies have had long experience in the Latin American trade and have built up a substantial good will which, they assert, would greatly facilitate the promotion of air transportation on the route in question. Unquestionably they are experienced in providing a public transportation service and presumably are familiar with the needs and desires of travelers. In this respect their position is not dissimilar to that of Pan American as an applicant for the same route.

The three steamship applicants point to certain operating advantages which would follow from the integration of sea and air operations under the same ownership and management. They relate principally to the possibility of the air branch of the business making joint use of the administrative and managerial staffs of the steamship companies, joint purchasing facilities and joint sales efforts. Such advantages are entitled to our serious consideration. They cannot, of course, be conclusive of the issue, since if they were to be regarded as controlling, the largest organization would always be preferred, a result which would sometimes be inconsistent with the development of a sound, competitive air transportation system.

Nor can we accept as conclusive the argument of Grace that it should be permitted the opportunity to conduct air transportation on this route because as a transportation company it has followed a normal evolution and now seeks to utilize the latest technical development for performing overseas services. Such argument would be more persuasive if the Board were not expressly charged with a public responsibility for the development of an air transportation system adequate to the needs of our commerce, our postal service and our national defense. A somewhat similar argument is advanced by Mooremack in the contention that it will suffer diversion of passenger traffic and may even experience adverse effects upon its freight business if it is not permitted to operate aircraft. No convincing evidence was offered to justify the assumption that Mooremack or any other steamship company will suffer a substantial diversion of its freight business if it does not operate aircraft. There is little likelihood that the freight which makes up the bulk of steamship cargoes will be carried by air in the foreseeable future. On the contrary, the

stimulus and assistance to our foreign trade which may reasonably be anticipated from the vigorous development of our international air transportation is likely to redound to the benefit of all American shipping companies and thus render groundless fears which were pressed upon us in the present proceeding.

The three steamship applicants also stress their ability to provide an integrated sea-air service under one responsible management—a result which they contend would be in the public interest. They have in mind a "one way by air—one way by boat" service. We are impressed with the desirability of such an integrated service for that part of the tourist travel which may desire it. We believe that many travelers, especially business travelers, will not be interested in such a combination service. We are not persuaded, however, that adequate arrangements cannot be worked out between air and surface carriers operating under independent managements, whereby such combination service may be made available to those who may desire it.

A major objection to reliance upon the claimed advantages of the combined sea-air service plan under a single management and ownership in determining the comparative public interest in the selection of a carrier to render an air service is that it will be at times incompatible with the promotional and competitive objectives which have been made the subject of an express mandate of the Congress to the Civil Aeronautics Board. It can hardly be doubted that an indifference on the part of management to the question whether a prospective traveler uses the company's boats or its airplanes would not be consistent with the fullest development of the potential air travel market. The proposed combined air-sea service would seek the sale of air transportation on the

plan of "one way by air—one way by boat." The applicants who propose such a plan are here confronted by independent air carriers applicants dedicated solely to the advancement of air transportation and bent on selling air travel not one way but both ways on the proposed route.

Closely related to the promotional is the competitive objective of the Act we administer. That Act recognizes controlled competition as a desirable device for the attainment of the funadmental purpose of the Act—a national transportation system adequate to the national interest. The three steamship applicants which we are considering propose to parallel their steamship services with an air service on the New York-San Juan route. It would be expecting too much to assume that a transportation company engaged in both air and sea transportation would be in a position to provide vigorous competition between its air transportation and its surface transportation on this route. Nor would it be reasonable to suppose that in any conflict of interest between their two transportation arms the issue would be resolved in favor of the air arm with its relatively small investment and against its sea transportation with its relatively large investment to support. Here we find revealed an inherent conflict of investment interests which frequently arises where the same company undertakes different business activities. Any assumption that an automatic competition between two forms of transportation, conducted by the same management and operating over the same route, could develop would be an assumption at war with the realities of business experience and of human nature. In such circumstances the transportation activities offering the larger investment interest may be expected to dominate in any competitive conflict between the two. We believe, therefore, that the maximum de-

velopment of air transportation on the proposed route cannot be assured under a plan which carries the inherent danger, in the event of a conflict of interest, that the air transportation may find itself a captive of the surface transportation interests.

American air transportation has developed in the past through vigorous and promotional efforts of independent air carriers directed to the development of an air travel demand. Its maximum development cannot be automatically achieved by merely providing air transport schedules and waiting passively for patrons of the service. In selecting a carrier to perform an air transportation service under circumstances where the Board has a number of applicants to choose from, this consideration cannot be ignored by the Board in resolving the problem of comparative public interest which is involved.

After considering the comparative advantages offered by the six applicants for the New York-San Juan service, we conclude that this route fits most logically into the Pan American system. The operation of this route by Pan American will strengthen and improve its services throughout South America. It will be able to provide single-company service for the heavy traffic moving between New York and Rio de Janeiro and points south as far as Buenos Aires. The single-company service will provide an incentive for the carrier to promote vigorously the development of traffic over the entire route. The convenience of passengers will be served in having a through service rather than in having to make connections at San Juan. We must also look ahead to the time when foreign-flag air carriers will be coming to the United States from South America, and we must place our carriers in a position to meet their competition on an equal basis. For all of these reasons, we find that

the public convenience and necessity require that the service between New York and San Juan be operated by pan American. In view of this conclusion it is unnecessary to determine whether the several steamship applicants for this route meet the requirements of the second proviso of section 408.

Although we do not find it necessary to decide the question whether the several steamship applicants for the New York-San Juan route met the requirements of the second proviso of section 408, we think it advisable for the guidance of future applicants to express our opinion on the question whether the special restrictive conditions of section 408(b) of the Civil Aeronautics Act covering the acquisition of air carriers by surface carrier are contained within the statutory standards of public convenience and necessity appearing in section 401 and therefore whether a surface carrier in applying for a certificate is under a *legal* restriction to which other applicants are not subject. In the second *American Export* case [37] we expressed an opinion—although such expression was unnecessary to the decision of that case—

[37] The history of this case is important to the issues here under consideration. The case originally involved (1) an application filed under section 408 of the Act by a steamship company, American Export Lines, Inc., to acquire control of a subsidiary, American Export Airlines, Inc., which the steamship company had organized for the purpose of engaging in air transportation, and (2) an application by the subsidiary company to the Board for certificates of public convenience and necessity. In its first opinion in this case (2 C. A. B. 16) the Board granted a temporary certificate of convenience and necessity to the subsidiary company, and with Ryan, Member, dissenting, dismissed the application for acquisition of control on the ground that section 408 "applies to cases involving the control of air carriers only where the acquisition of control of a corporate entity occurs at a time when that entity is already an air carrier" (2 C. A. B. 16, at p. 46). On appeal to the Circuit Court of Appeals, Second Circuit, the court sustained the issuance of the certificates, but held that the Board should have taken jurisdiction of the application filed under section 408. *Pan American Airways Co. v. Civil Aeronautics Board et al.*, 121 F. (2d) 810 (1941). The Board then took jurisdiction of the application and, after further hearing, denied it on the merits (3 C. A. B. 631).

that the conditions of section 408(b) including its provisos would have to be satisfied before any surface carrier could be authorized to engage directly in air transportation.[38] The particular condition which was in issue was that contained in the second proviso of section 408(b) which provided that the Board should not approve the acquisition of an air carrier by a surface carrier unless it found that the proposed acquisition "will promote the public interest by enabling such carrier other than an air carrier (the surface carrier) to use aircraft to public advantage in its operation and will not restrain competition."

After reexamining our earlier statements in the light of the discussion and argument presented in this proceeding, we are of the opinion that in determining the question of public convenience and necessity raised by the application of a surface carrier under section 401 of the Act we are required to consider, among other factors, the policy of Congress specifically expressed in the second proviso of section 408; in other words, that we must inquire, upon the record, whether the surface carrier applicant has satisfied the restrictive conditions of the second proviso of section 408 of the Act.

Our conclusion flows from well-established principles of statutory construction. As the United States Supreme Court recently said in *Securities and Exchange Commission v. Joiner Corporation*, 320 U. S. 344 (1943, at pages 350.1), the controlling doctrine of statutory construction is that "Courts will construe the details of an act in conformity with its dominating general purpose, will read

[38] Our dictum was announced in order that surface carriers might be fully apprised of the implications which then appeared to us to flow from the decision of the Circuit Court of Appeals and that they might be guided accordingly in the preparation and presentation of their applications.

text in the light of context and will interpret the text so far as the meaning of the word fairly permits so as to carry out in particular cases the generally expressed legislative policy." [30]

The statutory test by which an application under section 401 of the Act is to be judged is "public convenience and necessity". This standard is defined in section 2 of the Act in broad and general terms, so that, in discovering the intent of Congress as to the meaning and application of this standard, we must look both to the general expression of broad policies set forth in section 2 as well as to the indications of Congressional intent which appear elsewhere in the Act. Thus, in section 2 of the Act, the Board is instructed to preserve the inherent advantages of air transportation, to regard as in the public interest competition to the extent necessary to assure the sound development of an air transportation system adjusted to the national needs, to promote the development of air commerce, and to encourage and develop civil aeronautics. Thus, also, in other sections of the Act, Congress has imposed restraints on the maintenance of interlocking relationships between air and surface carriers [section 409(a)], has required disclosure by air carrier officials of stock interests held by them in surface carriers [section 407(c)] and in section 408(b) has limited the power of the Board to approve acquisitions of control of air carriers by surface carriers.

To hold that the ability of a surface carrier to meet the restrictive requirements of the second proviso of section 408 has no relation to an adjudication of that carrier's application for a certificate of public convenience and necessity under section 401 could hardly be said to

[30] See also *United States v. American Trucking Association, Inc.*, 310 U. S. 534, 542-3 (1940), and *United States v. Rosenblum Truck Lines, Inc.*, 315 U. S. 50, 55 (1942).

be consistent with this over-all legislative policy. On the other hand, a conclusion that such relation does exist is in accord both with the policy of the Act and with the decision of the United States Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co. v. Civil Aeronautics Board, supra.* In that case the Court held, contrary to the position taken by the majority of the Board, that section 408 and, of course, the second proviso thereof, applied to the acquisition of a new air transport enterprise inaugurated through a subsidiary of a surface carrier. Thus, the Court construed the intent of Congress in the Civil Aeronautics Act as applying the standards of section 408 to a new air transport enterprise. In the same decision, the Court also specifically ruled that the Board, in granting a certificate of public convenience and necessity to a subsidiary of a surface carrier, might consider the ability of the parent company to meet the standards set forth in section 408(b) of the act.[40]

The interpretation contrary to that which we adopt here would create an anomalous and illogical construction of the Act. It must now be agreed that a surface carrier cannot either acquire control of an existing air carrier, nor obtain an air transportation franchise for a subsidiary company organized for that purpose, without proving to the Board that the surface carrier will thereby be enabled to use aircraft to public advantage in its operation as surface carrier and that the transaction will not restrain competition. Surely there can be no valid distinction bearing upon the objectives of the Civil Aeronautics Act between a new air transport enterprise inaugurated by a surface carrier through a subsidiary and

[40] *Pan American Airways Co. v. Civil Aeronautics Board*, 121 F. (2d) 810, 816 (C. C. A. 2nd, 1941). See also *WOKO, Inc. v. Federal Communications Commission*, App. D. C., decided Jan. 21, 1946.

such an enterprise inaugurated by a surface carrier directly. If the Congress intended to apply the conditions of section 408 to new air transport enterprises established through subsidiaries of surface carriers then it must have intended also to apply a similar policy to such enterprises when inaugurated by surface carriers directly. In either case the surface carrier would be engaging in air transportation; only the manner of its accomplishment would be different.

In this connection it is worth noting that although the question was repeatedly asked in the course of the oral argument in the present proceeding, no satisfactory answer was offered by any of the counsel to explain why Congress should have intended to lay added restrictions upon surface carrier applicant who sought to engage in air transportation through a subsidiary corporation organized for the purpose and to impose no such restrictions upon a surface carrier that sought to engage directly in the same transportation business. To hold that the Congress intended the application of a different test to situations substantially similar would be to exalt form above substance, and we must reject such an interpretation.

Service from Houston and New Orleans to the Islands of the Caribbean and the North Coast of South America. —We have heretofore found that the public interest requires routes connecting Houston and New Orleans with Havana, points in the Greater Antilles, and San Juan, and also beyond Havana to Kingston, Aruba, Curacao, and Caracas. Chicago and Southern has applied for a service from New Orleans to San Juan via Havana and other intermediate points; it also proposes a service from Ciudad Trujillo to Caracas and a route from Havana to Kingston. Eastern's application, as amended at the hear-

ing contemplates a route from New Orleans to Havana and thence to Barranquilla via Kingston. National's application seeks services from New Orleans to Havana and San Juan; it also proposes a circular route from San Juan to Port of Spain and thence along the north coast through Caracas to Balboa. Pan American has applied for a route between New Orleans and Havana, and through amendment of its existing certificate, from the latter point to San Juan. Braniff's application proposes a service from Houston to Havana and via intermediate points in the Caribbean to San Juan thence to Port of Spain and along the north coast to Balboa. Delta proposes a route from New Orleans to San Juan via Havana and intermediate points. Waterman seeks authority to engage in air transportation between New Orleans and San Juan via Tampa. Although none of these applications exactly fits the pattern of air transportation which we have found required by the public convenience and necessity, each contains a general prayer which is sufficiently broad to encompass the route found to be required.

The traffic to be anticipated from Houston and New Orleans to Havana, San Juan, and the north coast of South America is insufficient to justify the operation of more than one air carrier at the present time. It is, therefore, necessary to determine which applicant can best serve the public convenience and necessity as defined in the Civil Aeronautics Act, particularly section 2 thereof.

With the exception of Waterman each applicant is an existing air carrier within the jurisdiction of the Civil Aeronautics Board. Waterman is a steamship operator in the Caribbean area. Each applicant could undoubtedly raise the necessary capital to inaugurate the service and could conduct an operation which would conform to the

minimum standards prescribed by the Act. Chicago and Southern, Eastern, Delta, and National each have permanent establishments at New Orleans which could be used for the proposed route. Pan American has a base at New Orleans for the New Orleans-Guatemala route. Waterman maintains extensive facilities at New Orleans in connection with its steamship operations. Chicago and Southern, Eastern, and Braniff have facilities at Houston for their domestic routes.

Waterman has engaged primarily in a cargo service between New Orleans and San Juan, operating one vessel per week with accommodations for 12 passengers. It argues that if it is permitted to inaugurate service utilizing aircraft it will be in a position to provide improved passenger facilities between New Orleans and San Juan without the extensive capital outlay and operating costs which would be incurred to provide similar facilities on its steamships and that it will be able to provide an integrated sea-air operation which could not be provided by any independent carrier. The record shows that as a steamship company it has operated without construction or operating subsidies. It is seeking a certificate without authority to carry mail and therefore would conduct its proposed operation without financial assistance from the Government. Although it is not likely that the New Orleans-San Juan service will require any substantial subsidy payment especially if it is conducted as a part of an independent airline system, the considerations advanced by Waterman would carry substantial weight if Waterman alone were an applicant. We are presented in the present case, however, with an issue of comparative qualification and Waterman as an applicant must be judged on the basis of its comparative merits as must every other applicant before us. These latter facts might warrant the issuance of a certificate of convenience and necessity at

a later stage in the development of our air transportation system when the foundation has been firmly laid to assure that adequate system of air transportation which the Act prescribes. Our duty is to select that carrier which can provide the maximum service and contribute most to a strong and integrated international air network. Hence, the fact that an applicant would acept a certificate which does not authorize the carriage of mail cannot be decisive in determining the choice of carriers.

The service proposed by Waterman would necessarily be limited to the transportation of passengers between New Orleans and Tampa, and Havana and San Juan, and would require all passengers bound for or coming from points in the interior to change planes at New Orleans and Tampa. This carrier therefore would be at a disadvantage in developing the long-haul traffic.

Eastern's application is limited to the establishment of a route from New Orleans to Havana and is predicated to a large extent upon the fact that such a route would connect with its proposed route to the Canal and thus provide service between New Orleans and the Canal Zone. Our primary purpose in establishing the present route is to provide an improved service from Houston and New Orleans to Havana, Camaguey, Port-au-Prince, Ciudad Trujillo, San Juan, and from Houston and New Orleans to Kingston, Aruba, Curacao, and Caracas. Service to the Canal Zone from Houston and New Orleans, which will be an incidental result of the establishment of such a route, will be in addition to the service to be provided between New Orleans and the Canal Zone via Merida and Guatemala City. If it were awarded a certificate to operate over the route now under consideration Eastern would be able to provide service only from points along its route No. 5 from New Orleans to Texas.

It is unlikely that traffic originating at Chicago or at points on Eastern's system in the East would move over the Eastern system to New Orleans for transportation to Havana or San Juan or points on the north coast. Such traffic would naturally move on Eastern's system through the Miami gateway.

Approval of National's application would require a change of planes at New Orleans for a very large part of the traffic moving over the new route.

The Delta proposal would enable that company to provide a single-company service for traffic originating at Fort Worth-Dallas and Shreveport and other points on its route between Shreveport and New Orleans. It would, however, require a change of planes for traffic west and north of Fort Worth-Dallas and on all traffic moving from Mississippi Valley points through the New Orleans gateway.

Pan American has bases at New Orleans, Havana, and San Juan and could undoubtedly inaugurate and maintain the proposed service with comparatively small additional capital outlay. However, approval of its proposal would involve a change of planes at New Orleans on all traffic moving over the route, except that destined from and to New Orleans.

New Orleans and Houston are the southern termini of Chicago and Southern's system which extends from Chicago and Detroit on the north through important industrial cities of the Mississippi Valley. Authorization of this company to extend its service over the route here in question would make possible a single-carrier operation connecting the important cities of the Mississippi Valley and the Great Lakes region with points in the

Caribbean and on the north coast of South America. In our opinion the selection of this company rather than one of the other applicants would result in a pattern of air transportation best suited to the development of the maximum volume of traffic. We find, therefore, that the public convenience and necessity require the grant of a certificate to Chicago and Southern to operate the routes from Houston and New Orleans as co-terminals to Havana, and beyond Havana (a) to Camaguey, Port-au-Prince, Cuidad Trujillo, and San Juan, and (b) to Kingston, Aruba, Curacao, and Caracas. In providing service under this certificate Chicago and Southern will of course be able to serve Houston and New Orleans on the same flight. Since we have concluded that the comparative public convenience and necessity would be best served by selecting Chicago and Southern to provide service over this route, it is unnecessary to determine whether Waterman has met the tests of the second proviso of section 408.

New Orleans and Houston to Guatemala City.—We have found that a route from the co-terminals Houston and New Orleans to Guatemala City via Merida is required by the public convenience and necessity. Pan American has an application for a route between New Orleans and Guatemala City via Merida and for a route between Houston and Merida. The application of Chicago and Southern contemplates a route between New Orleans and Balboa via Merida, Guatemala City, and other Central American points. Braniff seeks authority to operate between Houston and Balboa via Merida; it does not propose service to Guatemala City or other intermediate points.

The fact that Pan American has operated the New Orleans-Guatemala City service since 1943 under a tempo-

rary certificate has enabled it to develop a substantial traffic volume over this route. Its operations from New Orleans are closely coordinated with its service from Brownsville and Mexico City to the Canal Zone via Central American points and enable it to provide one-carrier service from New Orleans to Central America and the Canal Zone. Such an operation would not be possible if the route were awarded to either of the other applicants, except by duplicating Pan American's existing route between Guatemala City and Balboa and the traffic does not justify this at this time. Operations over Pan American's Houston-Merida segment of the route could be coordinated with this operation. While not of controlling weight, the fact should be noted that Pan American presently has establishments at Merida and Guatemala City which would have to be duplicated if either of the other applicants were selected to operate the route.

A consideration of all the factors bearing upon the comparative public interest leads to the conclusion that the public convenience and necessity require that Pan American be certificated between the co-terminals Houston and New Orleans on the one hand and Guatemala City via Merida on the other.

Miami-Tampa-Havana.—Chicago and Southern, Colonial, Eastern, and National all seek authority to operate between Miami and Havana. Each of these carriers except Colonial includes Tampa as a point to be served. The bulk of the traffic to be benefited by the additional service between Miami and Tampa on the one hand and Havana on the other is that originating in the eastern section of the United States. The operations of Chicago and Southern are limited to service from Chicago and Detroit in the north and from Houston and New Orleans in the south. This company could not provide through

service from eastern points to Havana. Moreover, neither Chicago and Southern nor Colonial now operates to either Miami or Tampa and the establishment of the service by either would result in operations unrelated to their present systems.

The Board's choice consequently lies between Eastern and National. Both of these companies conduct operations along the eastern seaboard between New York and Miami. National's north-south operation serves New York, Philadelphia, Norfolk, New Bern, Wilmington, Charleston, and Savannah. Eastern, in addition to serving Boston, New York, Philadelphia, Washington and other eastern cities and Florida points, is authorized to operate between Detroit, Cleveland, Akron, Chicago, St. Louis, Indianapolis, and other major cities and Florida points. Although Chicago and Southern will be able to provide a through service to Havana from Chicago, Detroit, St. Louis, Indianapolis and other traffic cities, either Eastern or National would be able to establish a through service to the cities of the East and either would be a competent operator.

While the Civil Aeronautics Act seeks the development of a sound national system, and not the advantage of an individual carrier as such, cases arise where the strengthening of an individual carrier is required for the sound development of the national system of which it is a part. The selection of National will give that carrier an opportunity to strengthen its competitive position and to prepare itself to render more effective service. Having fewer route miles and serving fewer large cities, it now has fewer opportunities than Eastern to increase the utilization of its equipment and to achieve similar economies in operation. The addition of the Miami-Havana and the Tampa-Havana routes will give National's man-

agement an opportunity to realize such gains in operating efficiency. The award of the proposed route to National will place that carrier in the field actively promoting international air travel. It may be noted that National's promotional activities will not be limited to the Miami-Havana and Tampa-Havana travel, for its connection with Chicago and Southern at Havana will provide an alternate and competitive route from all points on its system to the West Indies and the north coast of South America.

Pan American also seeks authority to conduct operations from Tampa. Under our authorization herein National will be in a position to accommodate local traffic between Tampa and Havana, and the volume of such traffic does not appear sufficient to justify inauguration of the additional service proposed by Pan American. We conclude therefore that the public convenience and necessity do not require amendment of Pan American's certificate to authorize service to Tampa in addition to Miami.

We find on the basis of the record and the considerations here presented that the public convenience and necessity require service by National from Tampa and Miami as co-terminals to Havana. The extension of National to Havana will enable that company to provide a single-company through service from New York, Philadelphia, Norfolk, Wilmington, Charleston, and Savannah. Through cooperative arrangements with Delta, it will also be able to provide a two-carrier connecting service from Chicago, Cincinnati, Knoxville, and Atlanta to Havana in competition with the service now provided by Eastern and Pan American.

Service to South America.

The Board was equally divided on the question of whether the public convenience and necessity require at this time the establishment of any of the proposed trunkline services through South America to Buenos Aires and the applications for such service therefore failed for want of affirmative vote by a majority of the Board. Vice-Chairman Ryan and Member Branch opposed the establishment of additional trunkline service through South America at this time. Chairman Pogue favored the extension of Braniff from Houston to Rio de Janeiro, Buenos Aires, and Montevideo, via Havana, the Canal Zone, and points along the west coast of South America. Member Lee favored the extension of Braniff from Houston to Lima, via Merida, Beliza, Balboa, Bogota, and Quito; and an extension of Eastern from Miami to Balboa via Havana. He also favored extension of Chicago and Southern from Caracas via Manaos and Corumba, Sao Paulo, Rio de Janeiro, Ascuncion, Buenos Aires, and Montevideo. The President, having concluded that an additional United States air carrier should be extended to Rio de Janeiro and Buenos Aires, it is necessary for this Board to determine both the routing and the applicant which can best serve the national public interest.

There are five carriers in this proceeding which propose extensive service of a trunkline nature between the United States and South America. Colonial and Mooremack propose the establishment of routes from New York City to Rio de Janeiro and Buenos Aires, via points along the east coast of South America. The application of Chicago and Southern contemplates the establishment of a route from New Orleans to the South American terminals named above via east coast points. None of

these proposals would provide service to important traffic centers of the west coast.

Under the general clause of their applications in which these carriers seek authority to provide service to these points to which the Board finds service required by the public convenience and necessity, it is probable that they could be considered as applicants for routes extending to west coast points. As has been heretofore pointed out, Mooremack is a steamship operator conducting service to east coast points. Our discussion hereinbefore in connection with this company's proposal to provide service between New York and San Juan, applies with equal force here. The route which is here being established will require the maximum effort possible if it is to be developed upon an economically sound basis, and we believe that the traffic potential can be best developed by one of the air carrier applicants here involved.

Colonial would be in a position to provide service to the important traffic developing centers of the northeast. Historical data with respect to the volume of traffic indicate that this area may be expected to develop about 42 percent of all traffic moving to South America. Colonial, of course, would not provide a direct single carrier service to that portion of the country lying in the north central and south central states which in the past developed about 35 percent of the total traffic to South America. If Colonial were routed through Charleston, it is probable that a portion of the traffic originating in this area would be able to utilize the Colonial route through connections at Charleston.

The importance of providing service between the traffic generating areas of the northeast is recognized. It should be pointed out, however, that in extending Pan

American from New York to San Juan, this area will be afforded a substantially improved service to the Caribbean area and to the east coast of South America. In addition, we have long recognized the desirability of an application to the Board which would permit a determination of the question of extending Pan American Grace Airways from its present terminal at Balboa to a point in the United States. If such an extension were made to Miami or New York, or some other point on the eastern seaboard, the eastern part of the country would be afforded a fast direct service to the west coast of South America and to Buenos Aires.

Such an extension of Panagra was the subject of an investigation instituted by the Board in 1942, which terminated in a dismissal on the ground that the Board was without power to accomplish the compulsory extension of Panagra to the United States.[41] This case has recently been remanded to the Board by the Circuit Court of Appeals for the Second Circuit for further consideration.[42]

Before instituting the *Panagra Terminal Investigation* the Board explored the possibility of working out a voluntary settlement of the controversy between Pan American and W. R. Grace & Company. Several conferences were held with both parties. Finally the Board suggested that the parties enter into an agreement under which sufficient shares of the two stockholders would be transferred to an independent voting trustee or trustees to permit the election to the Panagra board of an independent director or directors, or under which such an independent public director or directors might otherwise

[41] *Panagra Terminal Investigation*, 4 C. A. B. 670 (1944).
[42] *W. R. Grace & Co. v. Civil Aeronautics Board, et al.*, C. C. A. 2nd, January 29, 1946; rehearing denied February 21, 1946.

be appointed, who would be able to break the deadlock resulting from the equal division of ownership of Panagra stock between the two companies. After it became apparent that no satisfactory voluntary agreement could be reached by the parties and that all efforts to mediate the differences between them would be unsuccessful, the Board issued its order instituting the *Panagra Terminal Investigation* proceeding.

In the *Panagra Terminal Investigation* the Board took note of the unhealthy condition existing in the internal affairs of that company by reason of its joint ownership and control by Pan American and W. R. Grace & Company, and pointed out that deadlock between the two interests equally represented in the ownership of Panagra was likely to occur again in view of the conflicting interests of the two co-owners.

In view of the facts above outlined we feel that the joint owners should in the public interest cooperatively enable Panagra to apply for access to the east coast of the United States.

Western's application proposes a route from Los Angeles to Rio de Janeiro and Buenos Aires via the Canal Zone and points in Colombia, Peru, Bolivia, and Paraguay. Braniff's application seeks a route from Houston to Rio de Janeiro or Buenos Aires via important west coast points. Western would be able to provide a through service only to the western section of the country served by its system whereas Braniff would be in a position to provide such a service to the middle western and Rocky Mountain areas through which its routes operate. In addition it is significant that although an applicant for routes in South America via West Coast points, Western filed no exceptions to the recommendation of the exam-

iners that applications for additional routes in South America be denied. Braniff, on the other hand, on exception, brief, and in oral argument protested vigorously against this recommendation and argued the need for service which would compete with Panagra. It is of course of the utmost importance in authorizing additional service to South America that the task be entrusted to a strong carrier keenly interested in the establishment of and capable of achieving the maximum development of the traffic potential of the area to be served. The record shows that Braniff has long had a deep interest in the establishment of service to Latin American countries. Through its long-standing connections at Brownsville with Pan American and more recently through its connections with CMA and Aerovias Braniff at Laredo it has carried a substantial volume of traffic destined to points south of the border.

The issuance of a certificate to Braniff to establish a route from Houston to the Canal Zone via Havana and from that point via the intermediate points Bogota, Quito, Guayaquil, Lima, La Paz, Ascuncion, and beyond Ascuncion in two branches to Sao Paulo and Rio de Janeiro and to Buenos Aires would result in the establishment of a sound system of air transportation providing that competitive service to major traffic points in South America.

Under such a route pattern Braniff would be in a position to provide a single-carrier service to Havana, the Canal Zone, points along the west coast of South America, Rio de Janeiro and Buenos Aires from the area west of the Mississippi River served by its system. The north and south central areas, including such important industrial cities as Chicago, Kansas City, Tulsa, Oklahoma City, Fort Worth-Dallas, and Denver, would in general be direct-

ly served by the Braniff system. At Havana, Braniff would be able to effect connections with Chicago and Southern for traffic originating at points served by that carrier and not by Braniff, including such important cities as Detroit, St. Louis, and Memphis.

Braniff would also connect with National at Havana and thus provide an excellent connecting service for traffic from the eastern part of the United States which would compete directly with the present service of Eastern and Pan American connecting at Miami. The historic data bearing on traffic flow show that about 47 percent of the total traffic destined for the Canal Zone and South America originated along the Atlantic Coast. In view of the substantial volume of potential traffic thus available it is a reasonable assumption that Braniff and National will develop the connecting service to its maximum efficiency.

Since the primary purpose of the Braniff route to South America via Havana is to accommodate long haul traffic to South America we will include a restriction in Braniff's certificate requiring it to serve Havana only on flights originating at points in South America.

A number of new routes or short cuts are proposed by Pan American to provide an improved service between the United States and points in South America. Routes are proposed from points on the east coast of the United States via Caracas and Manaos to Rio and Buenos Aires. Routes are also proposed from the Canal Zone through the center of South America to major east coast points, one of which would extend through Bogota and Manaos to Rio; and another from the Canal Zone via Manaos and Asccuncion to Buenos Aires.

An operation from New York to San Juan in conjunction with Pan American's present service would provide a route closely approximating the great circle route between New York and Rio. The San Juan route would also effect a substantial saving in time and mileage to Buenos Aires. Our approval of Panagra's proposed express service from the Canal Zone to Buenos Aires via west coast points would provide a New York-to-Buenos Aires route of 5,671 miles. The establishment of the service proposed by Pan American to Buenos Aires via the Manaos cutoff would provide a route of about 5,436 miles between New York and Buenos Aires thus effecting a saving of only 235 miles over the Panagra routing.

Data respecting the costs of developing airport and airway aids for these proposed routes were limited and estimates varied widely.[43] In view of the substantial improvements made available by the routes established herein, the limited volume of traffic to be expected from the proposed cutoff routes, and the substantial capital costs to establish airway aids and airport facilities, we conclude that these routes are not required by the public convenience and necessity.

Panagra has proposed an express service from the Canal Zone to Guayaquil, Lima, Antofagasta, and Buenos Aires. The service would save about 727 miles compared with the present service via all intermediate points. However, the route proposed is essentially a nonstop operation between points on its system. The substantial mileage savings thus made possible, not only for local traffic between the Canal Zone and points in South America, but also for connecting United States traffic, fully justify the

[43] For example, Pan American estimated the cost of airport facilities at Caracas, Manaos, Corumba, and Ascuncion at $700,000. Eastern on the other hand submitted a study which indicated that the cost of establishing facilities to maintain service at Manaos, Corumba, and Ascusion would be approximately $6,000,000.

service proposed. We see no reason, however, to amend Panagra's certificate in order to authorize the service which it seeks. We shall grant to Panagra in this proceeding a nonstop authority permitting the inauguration of the express or nonstop service.

Cristobal is designated in the certificate as the northern terminal piont for Panagra's route to Balboa via the west coast of South America. On October 9, 1940, by Exemption order Serial Number 684, Panagra was granted authority to conduct operations to the Canal Zone via Balboa in lieu of Cristobal. Its operations have been continually conducted to this point since that time under authority from the Board. In its application seeking authority to conduct an express service, Panagra designates Balboa as the terminal point in the Canal Zone. In view of the facts outlined in connection with Pan American's proposed substitution of Balboa for Cristobal, we find that Panagra's certificate should be amended to make the same substitution.

Miscellaneous Amendments.

Buenos Aires-Montevideo.—Panagra seeks an amendment of its certificate to authorize operations between Buenos Aires and Montevideo.[44] It operated between Buenos Aires and Montevideo prior to 1938. It plans to operate a shuttle service utilizing DC-3 equipment to meet the local needs for service between these two cities. Pan American operates between these cities on its through schedules and proposes to conduct a shuttle service of six round trips daily. While the record does not substantiate a need for additional local service between these cities the benefits which would accrue to the long-haul traveler

[44] Buenos Aires, the capital of Argentina, has a population of about 2,450,000 and Montevideo, the capital of Uruguay, has a population of 680,000.

utilizing the Panagra service would justify an extension of its route from Buenos Aires to Montevideo. We find therefore that the public convenience and necessity require the amendment of Panagra's certificate to permit service between Buenos Aires and Montevideo, subject to the condition that service to Montevideo shall be provided only on flights originating or terminating at Santiago, Chile, or points north thereof; or at Salta, Argentina, or points north thereof.

Sao Paulo, Brazil.—Pan American's present certificate designates Sao Paulo as an intermediate point between Rio de Janeiro and Curityba. Pan America asks an amendment to include this city as an intermediate point between Rio de Janeiro and Porto Alegre. Since June 13, 1943, Pan American has served Sao Paulo on its through flights between Rio de Janeiro and Buenos Aires under an Exemption Order, Serial No. 2358. Sao Paulo is the second largest city in Brazil with a population of 1,318,000; it is the largest industrial and commercial center of Brazil. The amendment proposed would facilitate the service to Sao Paulo on through flights. We find that the proposed amendment is required by the public convenience and necessity.

Curacao.—Pan American has applied for authority to serve Willemstad, Curacao, as an intermediate point on its route between Miami and La Guaira. Curacao is an important island of the Dutch West Indies, the center of a large oil development in which United States citizens have made substantial investments. Pan American served Willemtstad as an intermediate point on its north coast service in 1930 and 1931, and since February 7, 1944, has served the city as an intermediate point on its route between Miami and La Guaira under an Exemption Order (Serial No. 2665). We have authorized Chicago and

Southern to serve Curacao as an intermediate point between Havana and Caracas. Such a route will provid Curacao with direct service to New Orleans and Houston. It will also make available service to eastern points of the United States through connections at Havana. We do not believe that sufficient traffic is available to justify an additional service and we therefore find that the service proposed by Pan American is not required by the public convenience and necessity and that its application in this regard should be denied.

Santiago.—Santiago, the fourth largest city of Cuba, is served by Pan American as an intermediate point between Port-au-Prince and Kingston. Pan American is also authorized (Exemption Order, Serial No. 3024, July 24, 1944) to serve Santiago in lieu of Antilla as an intermediate point between Miami and Port-au-Prince. Antilla is a city with a population of 23,327. In view of the greater importance of Santiago as a source of traffic, we find that the public convenience and necessity require an amendment of Pan American's certificate substituting Santiago for Antilla as an intermediate point between Miami and Port-au-Prince.

Additional Service to Havana.—Pan American seeks to amend its certificate between Miami and Balboa via Kingston to include Havana as an intermediate point. It states that the inclusion of Havana would add only 59 miles to the nonstop distance and only 15 miles to the route via Camaguey. It contends that Havana has an appreciable volume of traffic with the Canal and South America and that the amendment would permit it greater flexibility of operations in the Caribbean area. We have found that the public convenience and necessity require service by Chicago and Southern from Havana to Kingston, at which point such service will connect with Pan

American's route to the Canal Zone. The volume of traffic between Havana and the Canal Zone does not at this time appear sufficient to warrant a more direct routing.

We find, therefore, that the amendment proposed by Pan American is not required by the public convenience and necessity at the present time.

Pan American also seeks to amend its authorization to include Havana as an intermediate point on its Miami-Kingston-Barranquilla route and on its route between Miami and San Juan. It proposes to operate local schedules between Havana and San Juan to accommodate traffic moving from Mexico and from Havana to various Caribbean points. Chicago and Southern will hereafter be able to provide the service for which Pan American has applied, and there is no justification for a duplication of that service. We find, therefore, that Pan American's proposal to include Havana on these routes is not required by the public convenience and necessity and that its application in this regard should be denied.

Mail between Port-au-Prince and Kingston.—Pan American's "grandfather" certificate authorizes it to operate between Port-au-Prince and Kingston only for the transportation of persons and property other than mail because it held no air mail contract between these points when the Civil Aeronautics Act became effective. Pan American seeks permission to carry mail between these points. The authorization would not result in any appreciable increase in the cost to the Government and it would permit somewhat greater flexibility in the carriage of mail. We find, therefore, that the public convenience and necessity require this amendment of Pan American's certificate.

Substitution of Caracas for La Guaira.—Caracas is the capitol of Venezuela and its largest city. As of 1936 it

had a population of 203,342. Owing to the absence of suitable airport facilities, Pan American has served Caracas through La Guaira both on the north coast service and as a terminal point on the transcaribbean service from Miami. La Guaira is a town of only 8,500 people. Pan American seeks to name Caracas as the point to be served so that if airport facilities become available at Caracas it may be served directly. We find that the public convenience and necessity requires the destination of Caracas in lieu of La Guaira.

Substitution of Balboa for Cristobal.—Airport facilities at Cristobal have been inadequate for a number of years for commercial used by land-based aircraft. Pan American asserts that the military authorities have indicated that in their opinion all air carriers should use the Balboa airport where a large new terminal has been constructed by the Government. Pan American has used the airport at Balboa for all 4-engine planes since the fall of 1940 (Exemption order, Serial No. 685, dated October 9, 1940) and for all schedules since the latter part of 1941. We find that the public convenience and necessity require amendment of Pan American's certificate to authorize operations at Balboa in lieu of Cristobal on a permanent basis.

On the basis of the foregoing considerations and all evidence of record, we find that the public convenience and necessity require:

1. The permanent certification of American Airlines, Inc., authorizing air transportation of persons, property and mail between the terminal point Mexico City, Mexico, and the intermediate point Monterrey, Mexico, and (a) beyond Monterrey the terminal point El Paso, Tex., and (b) beyond Monterrey the intermediate point San Antonio, Tex., and the terminal point Fort Worth-Dallas, subject

to the condition that service to San Antonio shall be provided only on flights originating or terminating at Mexico City and at Fort Worth-Dallas or points north thereof.

2. The permanent certification of Braniff Airways, Inc., to engage in air transportation of persons, property, and mail between the co-terminal points San Antonio, Tex., and Laredo, Tex., the intermediate point Monterrey, Mexico, and the terminal point Mexico City, Mexico.

3. The permanent certification of Braniff Airways, Inc., authorizing air transportation of persons, property and mail between the terminal point Houston, Tex., the intermediate points Havana, Cuba; Balboa, Canal Zone; Bogota, Colombia; Quito, Ecuador; Guayaquil, Eucuador; Lima, Peru; La Paz, Bolivia; Ascuncion, Paraguay; and (a) beyond Ascuncion, the intermediate point San Paulo, Brazil, and the terminal point Rio de Janeiro, Brazil, and (b) beyond Ascuncion, the terminal point Buenos Aires, Argentina, subject to the condition that Havana shall be served only on flights originating or terminating South America.

4. The permanent certification of Chicago and Southern authorizing overseas and foreign air transportation of persons, property, and mail between the co-terminal points New Orleans, La., and Houston, Tex., and the intermediate point Havana, Cuba, and (a) beyond Havana the intermediate points Camaguey, Cuba; Port-au-Prince, Haiti; and Ciudad Trujillo, Dominican Republic; and the terminal point San Juan, Puerto Rico; and (b) beyond Havana the intermediate points Kingston, Jamaica; Aruba, Netherlands West Indies; and Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela.

5. The permanent certification of Colonial Airlines, Inc., to engage in air transportation of persons, property,

and mail between the terminal point Washington, D. C., and the terminal point Hamilton, Bermuda; and between the terminal point New York, N. Y., and the terminal point Hamilton, Bermuda.

6. The permanent certification of National Airlines, Inc., authorizing air transportation of persons, property, and mail between the co-terminal points Tampa and Miami, Fla., and the terminal point Havana, Cuba.

7. The permanent certification of Pan American Airways, Inc., authorizing overseas and foreign air transportation of persons, property, and mail between the co-terminal points Houston, Tex., and New Orleans, La.; the intermediate point Merida, Mexico, and the terminal point Guatemala City, Guatemala.

8. The certification of Western Air Lines, Inc., to engage in air transportation of persons, property and mail between the terminal point Los Angeles, Calif., the intermediate points San Diego, Calif., and La Paz, Mexico, and the terminal point Mexico City, Mex.

9. The permanent certification of Eastern Air Lines, Inc., to engage in air transportation of persons, property, and mail between the terminal point New Orleans, La., and the terminal point Mexico City, Mex.

10. The permanent certification of Eastern Air Lines, Inc., to engage in air transportation of persons, property, and mail between the terminal point Miami, Fla., and the terminal point Havana, Cuba.

11. The amendment of Pan American's certificate (a) to extend service from Brownsville, Tex., to the terminal point Houston, Tex., via Corpus Christi, subject to the

condition that local service shall not be rendered between Brownsville, Corpus Christi, and Houston; (b) to substitute Santiago as an intermediate point for Antilla between Camaguey, Cuba, and Port-au-Prince, Haiti; (c) to include Sao Paulo as an intermediate point between Rio de Janeiro and Porto Alegre; (d) to authorize the carriage of mail between Port-au-Prince, Haiti, Santiago, Cuba, and Kingston, Jamaica; (e) to substitute Balboa for Cristobal, Canal Zone; (f) to substitute Caracas for La Guaira, Venezuela; and (g) to authorize overseas and foreign air transportation of persons, property, and mail between the terminal point New York, N. Y., and the terminal point San Juan, Puerto Rico.

12. The amendment of the Pan American-Grace Airways, Inc., certificate (1) to substitute Balboa, Canal Zone, as a terminal point in lieu of Cristobal, Canal Zone, and (2) to extend the Balboa-Buenos Aires operations to the terminal point Montevideo, Uruguay, shall be provided only on flights originating or terminating at Santiago, Chile, or points north thereof, or at Salta, Argentina, or points north thereof.

13. The authorization of Pan American-Grace Airways, Inc., to operate nonstop service between Balboa, Canal Zone, and Guayaquil, Ecuador; between Guayaquil and Lima, Peru; between Lima and Antofagasta, Chile; and between Antofagasta and Buenos Aires, Argentina.

14. That all routes proposed in the applications included in this proceeding not specifically covered in the above authorizations should be denied.

On the basis of the foregoing considerations and all the evidence of record, we find that the petition of W. R. Grace & Co., intervener, requesting that the Board find that the public interest requires the establishment of a

through route by Pan American-Grace Airways, Inc., between New York and points along the west coast of South America, and further requesting that the Board recommend to the President that he require or request Pan American-Grace Airways, Inc., to file an application for such service, should be denied.

On the basis of the foregoing considerations and all the evidence of record, we find that the above-named carriers are citizens of the United States within the meaning of the Civil Aeronautics Act, as amended, and that each is fit, willing, and able properly to perform the air transportation herein authorized, respectively, and to conform to the provisions of the Act of the rules, regulations, and requirements of the Board thereunder.

An appropriate order will be entered.

Pogue, Chairman, Ryan, Branch, and Lee, Members of the Board concurred in the above opinion. Young, Member, did not take part in the decision.

APPENDIX No. 1.

Description of Applications.

American Airlines, Inc., requests that its temporary certificate be made permanent by removal therefrom of all of the provisions limiting its term, or in the alternative, by the issuance of a new permanent certificate of public convenience and necessity for the Mexico City route, Docket No. 1173.

American Export Airlines, Inc., seeks authority to engage in air transportation of persons, property, and mail between the terminal point New York, N. Y., and San Juan, P. R., Docket No. 1170, and between the terminal point New York and the terminal point Hamilton, Bermuda, Docket No. 1232.

Braniff Airways, Inc., seeks amendment of its certificates for route No. 50 to designate Neuvo Laredo, Mexico, as a co-terminal point with Laredo, Tex., Docket No. 949. It is also applying for a certificate, Docket No. 1057, authorizing a route between the terminal point Houston, Tex., the intermediate point Merida, Mexico; Balboa, Canal Zone; Bogota, Colombia; Quito, Ecuador; Guayaquil, Ecuador; Lima, Peru; La Paz, Bolivia; Asuncion, Paraguay; and (a) beyond Asuncion, Paraguay, the intermediate point Sao Paulo, Brazil, and the terminal point Rio de Janeiro, Brazil, and (b) beyond Asuncion, Paraguay, the terminal point Buenos Aires, Argentina; and between the terminal point Houston, the intermediate points Havana, Camaguey, and Santiago, Cuba; Kingston, Jamaica; Port-au-Prince, Haiti; Ciudad Trujillo, D. R.; San Juan, Puerto Rico; St. Johns, Antigua, and Basse Terre, Guadeloupe; Fort de France, Martinique; Castries, St. Lucia; Bridgetown, Barbados; St. George, Granada; Port of Spain,

Trinidad; Caracas and Maracaibo, Venezuela; Barranquilla, Colombia, and the intermediate point Balboa, Canal Zone. Braniff also seeks a certificate, Docket No. 1194, authorizing service between Laredo and Mexico City via Neuvo Laredo and Monterrey, Mexico.

Chicago and Southern Air Lines, Inc., in Docket Nos. 798, 945, and 1061 seeks certificates authorizing operations over the following routes: (1) between Houston, Tex., and Mexico City, (2) between New Orleans, La., and Mexico City, (3) between New Orleans and the Canal Zone (a) via Central American points, and (b) via Tampa, Fla., Havana, and Kingston, (4) between New Orleans and San Juan (a) via Cuba, Haiti, and the Dominican Republic, and (b) via Tampa, Miami, Cuba, Haiti, and the Dominican Republic, and (5) between New Orleans and Manaos, via Tampa, Miami, Cuba, Haiti, Dominican Republic, Caracas, and beyond Manaos (a) to Rio de Janeiro via Goiania and Bello Horizonte, Brazil, and (b) to Montevideo, Uruguay, via Cuyaba and Corumba, Brazil, Asuncion, Paraguay, and Buenos Aires, Argentina.

Colonial Airlines, Inc., by applications in Dockets Nos. 445 and 894 seeks a certificate between New York and Nassau, the Bahamas, via Atlantic City, N. J., Norfolk, Va., Elizabeth City, New Bern, and Wilmington, N. C., and Myrtle Beach, Georgetown, and Charletown, S. C., and by application in Docket No. 1207 seeks certificates authorizing service over the following routes:

Route 1. New York, N. Y., and Montego Bay and/or Kingston, Jamaica, via the intermediate points Charleston, S. C., Nassau, Bahamas; Camaguey, Cuba and, in the alternative, from (a) Montego Bay and/or Kingston to Balboa, Canal Zone, and/or Cristobal, Panama; (b) Montego Bay and/or Kingston to Barranquilla, Colombia; Balboa, Canal Zone, and/or Cristobal, Panama.

Route 2. New York, N. Y., and Manaos, Brazil, via the intermediate points Charleston, S. C.; Nassau, Bahamas; Ciudad Trujillo, Santa Domingo; and/or Port-au-Prince, Haiti; Caracas, Venezuela; and (a) between Manaos and Rio de Janeiro, Brazil, via the intermediate points Goiania and Bello Horizonte, Brazil; (b) between Manaos, Brazil, and Montevideo, Uruguay, via Cuyaba, Brazil; Corumba, Brazil; Asuncion, Paraguay; Buenos Aires, Argentina.

Route 3. New York, N. Y., and Natal, Brazil, via the intermediate points Charleston, S. C.; Nassau, Bahamas; Port-au-Prince, Haiti; San Juan, Puerto Rico; Port of Spain, Triniad; and Belem, Brazil.

Route 4. New York, N. Y., and Mexico City, Mexico, via the intermediate points Charleston, S. C.; Havana, Cuba; and Merida, Yucatan.

Route 5. New York, N. Y., and San Juan, P. R., via the intermediate point Bermuda.

Route 6. New York, N. Y., and Bermuda.

Route 7. Norfolk, Va., and Bermuda.

Route 8. Miami, Fla., and Port of Spain, Trinidad; via the intermediate points Havana, Cuba, Camaguey, Cuba; Port-au-Prince, Haiti; San Juan, P. R.; St. John and St. Thomas, Virgin Islands.

Route 9. Miami, Fla., and Nassau, the Bahamas.

Route 10. Miami, Fla., and Merida, Yucatan, via Havana, Cuba.

Route 11. Miami, Fla., and Kingston, Jamaica, via Cienfuegos, Cuba; and (a) between Kingston, Jamaica, and

Cristobal, Panama, and/or Balboa, Canal Zone; (b) between Kingston and Cristobal, and/or Balboa, Canal Zone, via Barranquilla, Colombia.

Route 12. New York, N. Y., and Nassau, the Bahamas, via the intermediate points Atlantic City, N. J., Norfolk, Va., Elizabeth City, New Bern, and Wilmington, N. C.; Myrtle Beach, Georgetown, and Charleston, S. C.; and from Charleston to Nassau direct and/or via Miami and other coastal points.

Delta Air Corporation seeks a certificate in Docket No. 1159 authorizing service between New Orleans and San Juan, Puerto Rico, via the intermediate points of Havana, Camaguey, and Santiago, Cuba; Port-au-Prince, Haiti; and Ciudad Trujillo, Dominican Republic.

Eastern Air Lines, Inc., in Docket No. 782 seeks a certificate or certificates to operate—

(a) Between New Orleans, La., and Balboa or another proper city in Canal Zone, via such or all of the following intermediate points as may be found by the Board to be in the public interest: Merida, Mexico; Belize, British Honduras; Guatemala City, Guatemala; San Salvador, El Salavador; Tegucigalpa, Honduras; Managua, Nicaragua; and San Jose, Costa Rica.

(b) Between New Orleans, La., and Balboa or another proper city in Canal Zone, via Havana, Cuba.

(c) Between Tampa, Fla., and Balboa or another proper city in Canal Zone, via Havana, Cuba.

(d) Between Miami, Fla., and Balboa or another proper city in Canal Zone via Havana (or any other proper cities), Cuba.

Eastern in Docket No. 1066 seeks a certificate or certificates authorizing service as follows:

(a) Between the terminal point Boston, Mass., the intermediate points New York, N. Y., Washington, D. C. (Nassau, B. W. I., as alternate), and Ciudad Trujillo, Dominican Republic; and between the terminal point Chicago, Ill., the intermediate points Louisville, Ky., Atlanta, Ga., Miami, Fla., Nassau, B. W. I., and Ciudad Trujillo; and between the terminal point Detroit, Mich., the intermediate points Cleveland, Ohio (Charlotte, N. C., and Columbia, S. C., in the alternative), Jacksonville and Miami, Fla., Nassau, B. W. I., and Ciudad Trujillo; and between the terminal point St. Louis, Mo., and the intermediate points Nashville, Tenn., Atlanta, Ga., Miami, Fla., Nassau, B. W. I., and Ciudad Trujillo; and, beyond the intermediate point Ciudad Trujillo, the intermediate points Caracas (La Guaira), Venezuela; and Manaos, Brazil; and (a) beyond Manaos, the intermediate points Corumba, Brazil; Asuncion, Paraguay; and the co-terminal points Buenos Aires, Argentina, and Montevideo, Uruguay, with authority to conduct such transport operations between said co-terminal points; and (b) beyond Manaos the intermediate points Cuyaba and Sao Paulo, Brazil, and the terminal point Rio de Janeiro, Brazil.

(b) Between the terminal point New Orleans, La., the intermediate points Tampa and Miami, Fla., and Havana, Cuba, and the terminal point Balboa, Canal Zone.

(c) Between the terminal point Balboa, Canal Zone, the intermediate points Bogota, Colombia; Sao Felipe and Manaos, Brazil; and (a) beyond Manaos, the intermediate points Cuyaba and Sao Paulo, Brazil; and the terminal point Rio de Janeiro, Brazil; and (b) beyond Manaos, the intermediate points Corumba, Brazil, Asuncion, Paraguay,

and the co-terminal points Buenos Aires, Argentina, and Montevideo, Uruguay, with authority to conduct such transport operations between said co-terminal points;

(d) Between the terminal point New Orleans, La., and the intermediate points Houston, Corpus Christi and Brownsville, Tex., and Tampico, Mexico, and the terminal point Mexico City, D. F., with privilege of direct, nonstop operations to and from New Orleans, Houston and Corpus Christi as ports of entry in relation to Mexico City;

(e) Between the co-terminal points Chicago, Ill., and Detroit, Mich., the intermediate points Indianapolis, Ind., Memphis, Tenn., Corpus Christi, Tex., Tampico, Mexico, and the terminal point Mexico City, D. F.;

(f) Between any points or series or group of points in the United States and any points or series or group of points in the Caribbean area and Latin America between which the Board shall find that there is a substantial need for applicant's service, it being the wish and desire of applicant to establish and maintain full and effective air transportation service between points in its present and future system in the United States and points located in the Caribbean and Latin American territory to best serve the general public convenience and promote social, cultural, and economic development and unity in the Western Hemisphere. In this connection applicant brings to the attention of the Board the great air transport need and the traffic potential in the rich and rapidly developing area bounded by Balboa, C. Z.; Manaos, Brazil; and Caracas, Venezuela, and its willingness to provide service between cities in that area, as well as other Caribbean and Latin American areas.

(At the hearing Eastern limited its requests (1) to extend its service on route No. 5 to Tampico and Mexico

City from New Orleans, Houston, Corpus Christi, and Brownsville, Tex., and (2) to extend its present system to the Canal Zone from Miami, Tampa, and New Orleans via the intermediate points Havana, Kingston, and Barranquilla.)

Grace Line, Inc., in Docket No. 1166 seeks authority to engage in scheduled air transportation of persons, property, and mail between the terminal points New York and New York via the intermediate points Nassau, B. W. I., Aruba, N. W. I.; Curacao, N. W. I.; La Guaira (Caracas), Venezuela; Maracaibo, Venezuela; Barranquilla, Colombia; Balboa, Canal Zone; Kingston, Jamaica; and Nassau, B. W. I.

Atlantic Gulf and West Indies Steamship Lines seeks authority to operate between—

1. New York and Balboa, via Nassau, Havana, and Kingston.

2. New York City and Mexico City, via Nassau, Havana, Merida, and Vera Cruz, Mexico.

3. Balboa and Mexico City via San Jose, Costa Rica; Managua, Nicaragua; Tegucigalpa, Honduras; San Salvador, El Salvador; Guatemala City, Guatemala; and Oaxaca, Mexico.

4. Balboa and Port of Spain, via Cartagena and Barranquilla, Colombia; Maracaibo, Venezuela; Aruba; Willemstad, Curacao; and La Guaira, Venezuela.

5. New York City and San Juan direct and via Bermuda.

6. San Juan and Port of Spain, via Fort de France, and Bridgetown, British Guiana.

7. San Juan and Havana via Ciudad Trujillo, Port-au-Prince, Haiti, Santiago, and Camaguey, Cuba.

Moore-McCormack Lines, Inc., in Docket No. 1160 seeks authority to operate (a) between New York and Buenos Aires via San Juan, Port of Spain and Belem (Para), Sao Salvadore (Bahia), Rio de Janeiro, Sao Paulo, and Porto Alegre, Brazil and Montevideo, Uruguay; (b) between New York and Buenos Aires, via Bermuda, San Juan, Port of Spain, Belem (Para), Sao Salvadore (Bahia), Rio de Janeiro, Sao Paulo, Porto Alegre, and Montevideo; (c) between New York and Buenos Aires via Bermuda, St. Thomas, Port of Spain, Belem (Para), Sao Salvadore (Bahia), Rio de Janeiro, Sao Paulo, Porto Alegre, and Montevideo; (d) between New York and Buenos Aires via Nassau, Ciudad Trujillo, Port of Spain, Belem (Para), Sao Salvadore (Bahia), Rio de Janeiro, Sao Paulo, Porto Alegre, and Montevideo; and (e) between New York and New York, via Nassau, Ciudad Trujillo, San Juan, St. Thomas, and Bermuda.

National Airlines, Inc., in Docket No. 416 seeks a route between New Orleans and Havana, between New Orleans and Havana via Tampa, and between Tampa and Havana via Key West, Fla. In Docket No. 828, it seeks a route between Tampa and/or Miami and Balboa. In Docket No. 1167, National seeks a certificate authorizing operations between Tampa and/or Miami and Mexico City via Havana and Merida. In Docket No. 1168, National seeks certificates which would authorize it to conduct operations from Miami to Kingston, Jamaica, via Nassau and Cuba, thence around the Caribbean to Port of Spain, along the north coast of South America to Balboa, returning via Kingston and Havana to Miami.

Pan American Airways, Inc., in Docket No. 516, seeks authority to extend its existing route from Havana to Tampa. In Docket No. 545, a certificate is sought authorizing service between a terminal point or points at or near New York City and a terminal point or points at or near San Juan with authority to utilize Baltimore, Md. as a co-terminal point. This application was amended subsequently to seek a route between San Juan and (a) a terminal point at New York with authority to utilize Baltimore as a co-terminal, and (b) a terminal at Charleston, S. C., with an intermediate point at Nassau. It was stated at the hearing that Pan American was not pressing its application to serve Baltimore. In Docket No. 689, Pan American seeks amendment of its certificate to authorize stops at Camaguey as an intermediate point between Miami and San Juan and between Miami and the Canal Zone. On December 9, 1941, Pan American filed an application in Docket No. 701, seeking a certificate authorizing transportation of passengers and property only between Los Angeles and Mexico City either direct or with intermediate stops at Hermosillo, Mazatlan, and Guadalajara, Mexico. This application was amended on November 11, 1943, to seek a route between Mexico City and Los Angeles via Mazatlan only for the transportation of persons, property, and mail. In Docket No. 1157, Pan American seeks the following amendments to its Latin American certificates:

(A) Amendment of that portion of its certificate relating to service to Buenos Aires so as to provide in addition to the route presently authorized a more direct course on the portion of the route between San Juan and Asuncion, Paraguay, omitting the present intermediate stops and including intermediate stops at Caracas, Venezuela, and Manaos, Brazil; and

(B) An amendment of its certificate so as to provide in addition to the route presently authorized a more direct course between the Canal Zone and Rio de Janeiro, omitting the present intermediate stops and including intermediate stops at Bogota, Colombia, and Manaos;

(C) An amendment of the portion of its certificate relating to Miami-Canal Zone service so as to include Havana as an intermediate point;

(D) An amendment of the portion of its certificate relating to Miami-Nassau service so as to authorize service from Nassau to Santiago;

(E) An amendment of the portion of its certificate relating to the Puerto Rico-east coast of South America service so as (1) to authorize service from and to Havana connecting with route (a) at Santiago, (2) to authorize service from and to Havana connecting with route (a) at Kingston; and (3) to eliminate the restriction against the carriage of mail on the portion of route (a) between Port-au-Prince, Santiago, and Kingston;

(F) An amendment of the portion of its certificate relating to the Brownsville-Mexico City service so as (1) to authorize service between Mexico City and New Orleans, and (2) to extend the route from Brownsville to Houston, but without the right to carry passengers, property, and mail originating at one of said points and destined to the other;

(G) An amendment of its certificate issued in Docket No. 373 with respect to service between New Orleans and Guatemala City, via Merida, so as (1) to remove the time limitation in the said certificate, (2) to authorize service between New Orleans and Havana, (3) to authorize service

between Barranquilla and Houston via Merida, and (4) to consolidate the said certificate with Pan American's general certificate relating to its Latin American operations;

(H) To substitute (1) Balboa for Cristobal as now authorized by exemption order, and (2) Caracas for La Guaira;

(I) To include (1) Santiago on route (a) between Miami and Port-au-Prince; (2) Caracas on route (a) between Ciudad Trujillo and Caracas, as now authorized by exemption order; and (3) Sao Paulo on route (a) between Rio de Janeiro and Port Alegre, as now authorized by exemption order.

Pan American-Grace Airways, Inc., in Docket No. 1174, as amended, seeks authority to establish service between Balboa and Buenos Aires via Guayaquil, Ecuador, Lima, Peru, and Antofagasta, Chile, and between Buenos Aires and Montevideo.

Waterman Steamship Corporation, in Docket No. 525, seeks authority to engage in the transportation of persons and property except mail between New Orleans and San Juan via Tampa, subject to the provision that the applicant shall not be authorized to engage in local air transportation service between New Orleans and Tampa.

Western Air Lines, Inc., in Docket No. 1164, seeks a route between the terminal point Los Angeles, the intermediate points La Paz and Mexico City, Mexico; Guatemala City, Guatemala; San Jose, Costa Rica; Balboa, C. Z.; Bogota, Colombia; Iquitos, Peru; Cobija and Santa Cruz, Bolivia, and Asuncion, Paraguay, and (a) beyond Asuncion to the terminal point Buenos Aires, and (b) beyond Asuncion the intermediate points Curityba and Sao Paulo, Brazil, and the terminal point Rio de Janeiro, and (c) a route between the terminal point Buenos Aires, the intermediate points Montevideo, Porto Alegre, Curityba, and Sao Paulo, and the terminal point Rio de Janeiro.

APPENDIX No. 2.

Table 1.

Overseas Air Service Patterns—Transcaribbean and Offshore-Island Areas Analysis of Total Air Travel by Classification of Carrier, Traveler, and Geographic Area.—1941.

Carrier	With United States	Other international travel	Total international	National travelers	Total
Mexico, Bahamas, Cuba:					
Pan American, Panagra, affiliates..	83,748	4,623	88,371	47,263	135,634
Foreign carriers	.....	.....	.....	53,185	53,185
Total	83,748	4,623	88,371	100,448	188,819
Caribbean area:					
Pan American, Panagra, affiliates..	18,864	25,239	44,103	14,609	58,712
Foreign carriers	.....	43,525	43,525	172,340	215,865
Total	18,864	68,764	87,628	186,949	274,577
South America (excl. Columbia & Venezeula):					
Pan American, Panagra, affiliates..	5,543	13,724	19,267	41,399	60,666
Foreign carriers	....	35,009	35,009	106,700	141,709
Total	5,543	48,733	54,276	148,099	202,375

Table 2.

Penetration of 1938 Sea and Air Passenger Traffic by 1941 Air Passenger Traffic. Total Passenger Traffic in Both Directions (Excluding Sea Cruises) Between the United States and Bermuda, Caribbean Area, and Other Latin America

Area or country	Total first, cabin class and air passenger traffic 1938 (1)	Total sea and air passenger traffic 1938 (2)	Total air passenger traffic 1941 (3)	Percent of penetration by 1941 air traffic: Total 1938 sea and air traffic (3)÷(2) (4)	Percent of penetration by 1941 air traffic: First and cabin class sea and air traffic (3)÷(1) (5)
	116,733	118,024	5,829	4.9	5.0
Bahamas, Cuba, and Mexico:					
Bahamas	21,595	21,689	13,530	62.4	62.7
Cuba	153,514	158,721	55,622	35.0	36.2
Mexico	14,026	14,629	14,596	99.8	104.1
Total	189,135	195,039	83,748	42.9	44.3
Other Caribbean Area:					
Mainland:					
British Honduras	335	340	...	...	...
Guatemala	5,031	5,065	850	16.8	16.9
Salvador	478	500	154	30.8	32.4

Salvador	476	508	154	30.3	32.4
Honduras	1,647	1,651	80	4.8	4.9
Nicaragua	604	613	189	30.8	31.3
Costa Rica	1,449	1,472	267	18.1	18.4
Canal Zone and Panama	15,672	17,548	4,731	27.0	30.2
Colombia	4,765	5,092	1,945	38.2	40.8
Venezuela	4,145	5,300	1,995	37.6	48.1
Subtotal	34,124	37,689	10,211	27.2	29.9

Appendix No. 2—Page 3.

Table 2 (continued).

Area or country	Total first, cabin class and air passenger traffic 1938	Total sea and air passenger traffic 1938	Total air passenger traffic 1941	Percent of penetration by 1941 air traffic: Total 1938 sea and air traffic (3)÷(2)	Percent of penetration by 1941 air traffic: First and cabin class sea and air traffic (3)÷(1)
Islands:					
Jamaica	6,745	7,177	1.759	24.5	26.1
Puerto Rico	14,986	32,005	4,182	13.1	27.9
Haiti & Dominican Republic	3,015	3,608	957	26.5	31.7
Lessor Antilles (Excl. N. W. I.)	5,192	7,412	1,755	23.7	33.8

Area or country	Total first, cabin class and air passenger traffic 1938	Total sea and air passenger traffic 1938	Total air passenger traffic 1941	Percent of penetration by 1941 air traffic: Total 1938 sea and air traffic (3)÷(2)	Percent of penetration by 1941 air traffic: First and cabin class sea and air traffic (3)÷(1)
Netherlands West Indies	4,222	5,875	....	...	...
Subtotal	34,160	56,077	8,653	15.4	25.3
Total—Other Caribbean area	68,284	93,666	18,864	20.1	27.6
Other Latin America:					
Ecuador	612	676	578	85.5	94.4
Peru [1]	2,158	2,405	927	33.5	43.0
Bolivia	521	595	183	30.8	35.1
Chile	1,897	2,174	479	22.0	25.3
Subtotal	5,188	5,850	2,167	37.0	41.8
The Guianas	2,081	2,318	273	11.8	13.1
Brazil	4,525	5,289	1,473	27.9	32.6

[1] Total sea passengers for Bolivia and Chile prorated on the basis of 1938 mail, 21 percent to Bolivia and 79 percent to Chile.

All areas:					
Pan American, Panagra, affiliates..	108,155	43,586	151,741	103,271	255,012
Foreign carriers	.....	78,534	78,534	332,225	410,759
Grand total	108,155	122,120	230,275	435,496	665,771

Source: C.A.B., Overseas Air Service Patterns—Transcaribbean and Offshore-Island Areas, August 1944, page 57, exhibit A-1.

Paraguay	7	7	32	457.1	457.1
Uruguay	186	245	....	....	....
Argentina	4,045	4,891	1,598	34.7	39.5
Subtotal	10,844	12,700	3,376	26.5	31.1
Total—Other Latin America	16,032	18,600	5,543	29.8	34.6
Grand total (Excl. Bermuda)	273,451	307,305	108,155	35.2	39.6
Grand total (Excl. Bermuda; Bahamas, Cuba & Mexico)	84,316	112,266	24,407	21.7	28.9
Grand total	390,184	425,329	113,984	26.8	29.2

Source: C.A.B. Overseas Air Service Patterns, Transcaribbean and Offshore-Island Areas, August 1944, page 61, Exhibit B-10.

Appendix No. 2—Page 4.

Table 3.

Comparison of estimated postwar outbound air passenger traffic by countries, with air and surface passenger traffic for 1938.[1]

Country	1938 First class sea and air [2]	Passengers	Estimated ratio to 1938
United States to—			
Bahamas	11,380	11,400	1.0
Cuba	75,144	75,000	1.0
Puerto Rico	7,219	16,300	2.3
Trinidad and Barbados	1,613	4,700	3.0
Haiti	661	1,000	1.5
Dominican Republic	823	1,300	1.0
Jamaica	3,592	8,200	2.3
Aruba and Curacao	2,310	3,000	1.3
Other West Indies	628	1,900	3.0
Canal Zone and Panama	8,159	13,800	1.7
Other Central America	5,507	17,200	3.1
Mexico	36,571	53,500	1.5
Columbia	2,400	19,900	8.3
Venezuela	2,345	12,600	5.4
British Guiana Dutch Guiana French Guiana	1,109	600	0.5
Brazil	1,823	19,800	10.9
Argentina	1,369	12,800	9.3
Uruguay	194	1,700	.8
Paraguay	42	800	19.0
Ecuador	314	1,100	3.5
Peru	1,190	6,000	5.0
Bolivia	339	1,800	5.3
Chile	1,191	3,600	3.0
Total	165,923	288,800	1.6

[1] Docket No. 525, Pan American Airways, Exhibit PA-69, part 1.
[2] CAB Survey, Overseas Air Service Patterns, Transcaribbean and Offshore—Island Areas, January 1944, except Mexico.

Appendix No. 2—Page 5.

Table 4.

Grace Line, Inc., Estate of Future Air Passenger Movements Between the United States and Named Points.

Country	Southbound	Northbound
Nassau	24,975	25,087
Aruba/Curaçao	3,029	3,131
Venezuela	4,186	4,220
North Coast of Columbia	2,180	2,292
Cristobal—Balboa and Panama	10,280	9,250
Kingston	7,855	7,858
Total	52,505	51,838

Source: C. A. B., Docket No. 525, *Grace Line, Inc.*, Exhibit No. BL-48A, adapted for passenger traffic only.

Appendix No. 2—Page 6.

Table 5.

Passenger Traffic Estimates.

For Areas Served by Proposed Moore-McCormack Routes.

Postwar years	Total air passengers	East coast route			Caribbean routes		Total ship passengers	Grand total passengers
		Total east coast	Other lines	Moore-McCormack	Moore-McCormack	Other lines		
1st Year.....	67,500	20,000	15,000	5,000	2,500	45,000	22,500	90,000
2nd Year.....	90,000	35,000	25,000	10,000	4,000	51,000	25,000	115,000
3rd Year.....	110,000	49,500	33,500	16,000	5,500	55,000	25,000	135,000
4th Year.....	123,000	55,000	37,000	18,000	6,500	61,500	27,000	150,000
5th Year.....	135,000	60,000	40,000	20,000	7,500	67,500	30,000	165,000

Source: C.A.B. Docket No. 525, Moore-McCormack Lines, Exhibit MM-06.

Appendix No. 2—Page 7.

Table 6.

Distribution of 1941 Air Passengers by Area and Class of Travel.

Class	First area	Second area	Third area
National	100,448	186,949	148,099
With United States	83,748	18,864	5,543
All other international	4,623	68,764	48,733
Total	188,819	274,577	202,375

Source: Overseas Air Service Patterns, Transcaribbean and Offshore-Island Areas, page 6.

Appendix No. 2—Page 8.

Table 7.

Summary of First-class Mail Traffic from the United States to Latin America and Bermuda.

Country	Sea Pounds	Air Pounds	Total Pounds
Bermuda[1]	19,990	2,660	22,650
Bahamas	8,375	3,202	11,577
Cuba	222,920	41,110	264,030
Puerto Rico	135,001	45,276	180,277
Other Caribbean islands	97,402	22,970	120,372
Central America	199,260	46,528	245,788
South America	375,376	76,394	451,770

Source: Overseas Air Service Patterns, Transcaribbean and Offshore Island Areas, page 80.

[1] Year ended June 30, 1941.

Table 8.

Number of travelers per day, cross-classified by areas of origination and destination, keyed to selected gateways.[1]

Latin American areas	United States Areas					
	North and Middle Atlantic (2)	South Atlantic and Florida (3)	North Central (4)	South Central (5)	North and south western (6)	Total (7)
Bahamas	19.59	3.83	6.65	0.60	0.51	31.18
Cuba	129.37	25.26	43.91	3.95	3.38	205.87
Lesser Antilles[2]	1.58	0.20	0.72	0.61	0.64	3.75
Mexico	36.19	9.84	16.46	13.90	34.08	110.47
Central America (excluding Canal Zone)	6.40	0.79	2.91	2.46	2.61	15.17
Canal Zone and Panama	9.36	1.14	4.26	3.59	3.82	22.17
Jamaica Netherlands West Indies and North Coast of South America	12.38	1.53	5.63	4.75	5.05	29.34

[1] Derived from data contained in Overseas Air Service Patterns—Transcaribbean and Offshore-Island Areas. The sea and air travel, mainly for 1938, is distributed principally on the basis of passport data and otherwise as indicated in the technical notes of the study.

[2] Except Netherlands West Indies and Trinidad.

Greater Antilles, Trinidad and East Coast of South America.....	14.71	1.81	6.69	5.64	5.99	34.84
West Coast of South America and Buenos Aires Area	5.80	0.71	2.64	2.23	2.37	13.75
West Africa	0.04	...	0.02	...	0.02	0.08
Total	235.42	45.11	89.89	37.73	58.47	466.62

● Appendix No. 2—Page 10.

Table 9.

Percentage distribution of outbound travel from areas of orgination by areas of destination.[1]

Latin American Areas of Destination	United States Areas of Origin					
	North and Middle Atlantic (2)	South Atlantic and Florida (3)	North Central (4)	South Central (5)	North and south western (6)	Total (7)
Bahamas	8.32	8.49	7.40	1.59	0.88	6.68
Cuba	54.95	56.00	48.85	10.47	5.79	44.12
Lesser Antilles[2]	0.67	0.44	0.80	1.62	1.09	0.80
Mexico	15.37	21.82	18.31	36.84	58.29	23.67

[1] Derived from Table 8.
[2] Except Netherlands West Indies and Trinidad.

Latin American Areas of Destination	United States Areas of Origin					
	North and Middle Atlantic	South Atlantic and Florida	North Central	South Central	North and southwestern	
Central America (excluding Canal Zone)	2.72	1.75	3.24	6.52	4.46	3.25
Canal Zone and Panama	3.98	2.53	4.74	9.51	6.53	4.75
Jamaica Netherlands West Indies and North Coast of South America	5.26	3.39	6.26	12.59	8.64	6.29
Greater Antilles, Trinidad and East Coast of South America	6.25	4.01	7.44	14.95	10.24	7.47
West Coast of South America and Buenos Aires Area	2.46	1.57	2.94	5.91	4.05	2.95
West Africa	0.02	...	0.02	...	0.03	0.02
Total	100.00	100.00	100.00	100.00	100.00	100.00

Table 10.

Percentage distribution of outbound travel to areas of destination by areas of origination.[1]

Bahamas	62.83	12.28	21.33	1.92	1.64
Cuba	62.84	12.27	21.33	1.92	1.64
Lesser Antilles[2]	42.13	5.33	19.20	16.27	17.07
Mexico	32.76	8.91	14.90	12.58	30.85
Central America (excluding Canal Zone)	42.19	5.21	19.18	16.22	17.20
Canal Zone and Panama	42.22	5.14	19.22	16.19	17.23
Jamaica Netherlands West Indies and North Coast of South America	42.19	5.21	19.19	16.19	17.22
Greater Antilles, Trinidad and East Coast of South America	42.22	5.20	19.20	16.19	17.19
West Coast of South America and Buenos Aires Area	42.18	5.16	19.20	16.22	17.24
West Africa	50.00	...	25.00	...	25.00
Total	50.45	9.67	19.26	8.09	12.53

[1] Derived from Table 8.
[2] Except Netherlands West Indies and Trinidad.

Orders Serial Number 4793.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington, D. C., on the 17th day of May, 1946.

In the matter of the application of Waterman Steamship Corp. and other applications for certificates and amendments of certificates of public convenience and necessity, known as the Latin American Service Case. Docket No. 525 et al.

ORDER.

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions, and decision which is attached hereto and made a part hereof;

It Is Ordered, 1. That the certificate of public convenience and necessity issued to American Airlines, Inc., in Docket No. 510 et al., executed by the Board on April 14, 1942, and approved by the President of the United States on April 16, 1942, be amended so as to authorize American Airlines, Inc., subject to the provisions of said certificate, to engage in air transportation with respect to persons, property, and mail:

Between the terminal point Mexico City, Mex., the intermediate point Monterrey, Mex., and (a) beyond

Monterrey, the terminal point El Paso, Tex., and (b) beyond Monterrey, the intermediate point San Antonio, Tex., and the terminal point Fort Worth-Dallas, Tex., subject to the condition that service to San Antonio shall be provided only on flights originating at Mexico City, Mex., and terminating at Fort Worth-Dallas or a point north thereof, or originating at Fort Worth-Dallas or a point north thereof and terminating at Mexico City.

2. That there be issued to Braniff Airways, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail:

Between the co-terminal points San Antonio, Tex., Laredo Tex., the intermediate point Monterrey, Mex., and the terminal point Mexico City, Mexico.

3. That there be issued to Braniff Airways, Inc., a certificate of public convenience and necessity authorizing it subject to the provisions of such certificate, to engage in air transportation with respect to persons, property and mail as follows:

Between the terminal point Houston, Texas, the intermediate points Havana, Cuba, Balboa, Canal Zone, Bogota, Columbia, Quito, and Quayaquil, Ecuador, Lima, Peru, La Paz, Bolivia, and Asuncion, Paraquay, and (a) beyond, Asuncion, Paraguay, the intermediate point Sao Paulo, Brazil and the terminal point Rio de Janeiro, Brazil, and (b) bevond Asuncion, Paraguay, the terminal point Buenos Aires, Argentina; subject to the condition that service to Havana, Cuba, shall be provided only on flights originating at Hous-

ton, or a point in the United States, and terminating at a point in South America, or on flights originating at a point in South America and terminating at Houston, or a point in the United States.

4. That there be issued to Chicago and Southern Air Lines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail.

Between the co-terminal points New Orleans, La., and Houston, Tex., the intermediate point Havana, Cuba, and (a) beyond Havana the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, the intermediate points Kingston, Jamaica, Aruba, Netherlands West Indies, Curacao, Netherlands West Indies, and the terminal point Caracas, Venezeula; subject to the condition that the holder shall not carry persons, property or mail which, with respect to the points named herein in the certificate, originate at New Orleans and terminate at Houston, or originate at Houston and terminate at New Orleans.

5. That there be issued to Colonial Airlines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate to engage in air transportation with respect to persons, property and mail:

(a) Between the terminal point New York, N. Y., and the terminal Hamilton, Bermuda; and

(b) Between the terminal point Washington, D. C., and the terminal point Hamilton, Bermuda.

6. That there be issued to Eastern Air Lines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail as follows:

Between the terminal point New Orleans, La., and the terminal point Mexico City, Mexico.

7. That there be issued to Eastern Air Lines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail as follows:

Between the terminal point Miami, Fla., and the terminal point San Juan, Puerto Rico.

8. That there be issued to National Airlines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail as follows:

Between the co-terminal points Tampa and Miami, Fla., and the terminal point Havana, Cuba.

9. That the amended certificate of public convenience and necessity issued to Pan American Airways, Inc., in Docket No. 456, executed by the Board on November 5, 1943, and approved by the President on December 23, 1943, be further amended so as to (a) extend service from Brownsville, Tex., to the terminal point Houston, Tex.,

via the intermediate point Corpus Christi, Tex., subject to the condition that the holder shall not carry persons, property or mail which, with respect to the points named in the certificate, originate at Houston, Corpus Christi, or Brownsville and terminate at any of the other of said three points, (b) to substitute Santiago, Cuba, for Antilla, Cuba, as an intermediate point between Camaguey, Cuba, and Port-au-Prince, Haiti, (c) to include Sao Paulo as an intermediate point between Rio de Janeiro and Porto Alegro, Brazil, (d) to authorize the carriage of mail between Port-au-Prince, Haiti, Santiago, Cuba, and Kingston, Jamaica, (e) to substitute Balboa for Cristobal, Canal Zone, (f) to substitute Caracas for La Guaira, Venezuela, and (g) to authorize the carriage of persons, property, and mail between New York, N. Y., and San Juan, Puerto Rico;

10. That the certificate of public convenience and necessity issued to Pan American Airways, Inc., in Docket No. 373, executed by the Board on February 26, 1943, and approved by the President on March 12, 1943, be amended so as to authorize Pan American Airways, Inc., subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail between the co-terminal points Houston, Tex., and New Orleans, La., the intermediate point Merida, Mex., and the terminal point Guatemala City, Guatemala; subject to the condition that the holder shall not carry persons, property or mail which, with respect to the points named herein in the certificate, originate at New Orleans and terminate at Houston, or originate at Houston and terminate at New Orleans;

11. That the amended certificate of public convenience and necessity issued to Pan American-Grace Airways, Inc., in Docket No. 1403, executed by the Board on March 20,

1945, and approved by the President on April 24, 1945, be further amended so as to (a) substitute Balboa, Canal Zone, as a terminal point for Cristobal, Canal Zone, and (b) extend the Balboa-Buenos Aires operations to the terminal point Montevideo, Uruguay, subject to the condition that service to Montevideo, Uruguay, shall be provided only on flights originating or terminating at Santiago, Chile, or points north thereof, or at Salta, Argentina, or points north thereof;

12. (Vacated by order No. 4801, adopted May 23, 1946).

13. That Pan American-Grace Airways, Inc., is authorized to operate nonstop service between Balboa, Canal Zone and Guayaquil, Ecuador; between Guayaquil and Lima, Peru; between Lima and Antofagasta, Chile; and between Antofagasta and Buenos Aires;

14. That there be issued to Western Air Lines, Inc., a certificate of public convenience and necessity authorizing it, subject to the provisions of such certificate, to engage in air transportation with respect to persons, property, and mail as follows:

> Between the terminal point Los Angeles, Calif., and the terminal point Mexico City, Mexico.

15. That the exercise of the privileges granted by said certificates and amended certificates with respect to interstate and overseas air transportation shall be subject to the terms, conditions, and limitations prescribed by sections 238.3 and 238.5 of the Economic Regulations of the Board, all amendments thereto, and such other terms, conditions, and limitations as may from time to time be prescribed by the Board; and that the exercise of the privileges granted by the said certificates and amended certifi-

cates with respect to foreign air transportation authorized thereby shall be subject to the terms, conditions, and limitations prescribed by sections 238.4 and 238.7 of the Economic Regulations of the Board, all amendments thereto, and such others terms, conditions, and limitations as may from time to time be prescribed by the Board;

16. That said certificates and amendments of certificates authorized by this order shall be in the form attached hereto, shall be signed on behalf of the Board by the Chairman of the Board, and shall have affixed thereto the seal of the Board attested by the Secretary;

17. That said certificates and amendments of certificates shall be effective from the date of their approval by the President of the United States;

18. That temporary exemption orders dated October 9, 1940 (Order Serial No. 685), dated December 10, 1941 (Order Serial No. 1281), dated February 1, 1944 (Order Serial No. 2665), dated July 13, 1943 (Order Serial No. 2358) and dated July 24, 1944 (Order Serial No. 3024), be vacated upon the issuance of the certificates of public convenience and necessity and amendments thereto hereby authorized to be issued;

19. That the petition of W. R. Grace & Co., intervener, requesting that the Board find that the public interest requires the establishment of a through route by Pan American-Grace Airways, Inc., between New York and points along the west coast of South America, and further requesting that the Board recommend to the President that he require or request Pan American-Grace Airways, Inc., to file an application for such service, be and it hereby is denied; and

20. That all the applications in this proceeding, except to the extent to which they are granted in this decision and by this order, be and they are denied.

By the Civil Aeronautics Board:

(S.) FRED A. TOOMBS,
(Fred A. Toombs),
Secretary.

(Seal)

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended).

AMERICAN AIRLINES, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the terminal point Mexico City, Mex., the intermediate point Monterrey, Mex., and (a) beyond Monterrey, Mex., the terminal point El Paso, Tex., and (b) beyond Monterrey, Mex., the intermediate point San Antonio, Tex., and the terminal point Fort Worth-Dallas, Tex.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of

service may be authorized by the Board. The holder may (1) begin or terminate or begin and terminate trips at points short of terminal points; (2) continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the date of issuance of this certificate, as amended; and (3) continue to maintain regularly scheduled non-stop service between any two points not consecutively named herein, if non-stop service was regularly scheduled by the holder between such points on the date of issuance of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled non-stop service between any two points not consecutively named herein between which such service is authorized hereby. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign county, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate, as amended, shall be subject to (1) the condition that flights serving the intermediate point San Antonio, Tex., shall originate at Mexico City, Mex., and terminate at Fort Worth-Dallas, Tex., or a point north thereof, or originate at Fort Worth-Dallas, Tex., or a point north thereof, and terminate at Mexico City, Mex., and (2) such other reasonable terms, conditions and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board on this the 17th day of May, 1946.

(S.) L. WELCH POGUE,
Chairman.

(Seal)

Attest:

(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:

(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

BRANIFF AIRWAYS, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regu-

lations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the co-terminal points San Antonio, Tex., and Laredo, Tex., the intermediate point Monterrey, Mex., and the terminal point Mexico City, Mex.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board and may begin or terminate, or begin and terminate trips at points short of terminal points. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and may render scheduled nonstop service between any two points not consecutively named herein between which such service is authorized hereby. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign country, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

BRANIFF AIRWAYS, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the terminal point Houston, Texas, the intermediate points Havana, Cuba, Balboa, Canal Zone, Bogota, Colombia, Quito and Guayaquil, Ecuador, Lima, Peru, La Paz, Bolivia, and Asuncion, Paraguay,

and (a) beyond Asuncion, Paraguay, the intermediate point Sao Paulo, Brazil, and the terminal point Rio de Janeiro, Brazil, and (b) beyond Asuncion, Paraguay, the terminal point Buenos Aires, Argentina.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board and may begin or terminate, or begin and terminate trips at points short of terminal points. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and may render scheduled nonstop service between any two points not consecutively named herein between which such service is authorized hereby. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign country, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate shall be subject (1) to the condition that flights serving the intermediate point Havana, Cuba, shall originate at Houston or a point in the United States and terminate at a point in South America, or originate at a point in South America and terminate at Houston or a point in the United States, and (2) to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

CHICAGO AND SOUTHERN AIR LINES, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics

Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

> Between the co-terminal points New Orleans, La., and Houston, Tex., the intermediate point Havana, Cuba, and (a) beyond Havana, Cuba, the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, Cuba, the intermediate points Kingston, Jamaica, Aruba, Netherlands West Indies, Curacoa, Netherlands West Indies, and the terminal point Caracas, Venezuela.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board and may begin or terminate, or begin and terminate trips at points short of terminal points. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and may render scheduled nonstop service between any two points not consecutively named herein between which such service is authorized hereby. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign country, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate shall be subject to (1) the condition that the holder shall not carry persons, property or mail which, with respect to the points named herein, originate at New Orleans and terminate at Houston, or orginate at Houston and terminate at New Orleans, and (2) such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

COLONIAL AIRLINES, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

(a) Between the terminal point New York, N. Y., and the terminal Hamilton, Bermuda; and

(b) Between the terminal point Washington, D. C., and the terminal point Hamilton, Bermuda.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign country, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal named herein, or serve regularly a point or points in such foreign country in addition to that named herein.

The exercise of the privileges granted by this certificate shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

EASTERN AIR LINES, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics

Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the terminal point New Orleans, La., and the terminal point Mexico City, Mex.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign country, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to that named herein.

The exercise of the privileges granted by this certificate shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate as amended to be executed by its Chairman and the seal of the Board to be affixed hereto,

attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

EASTERN AIR LINES, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the terminal point Miami, Fla., and the terminal point San Juan, Puerto Rico.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of

service may be authorized by the Board. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto.

The exercise of the privileges granted by this certificate shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

NATIONAL AIR LINES, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the co-terminal points Tampa, Fla., and Miami, Fla., and the terminal point, Havana, Cuba.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign country, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate shall be subject to such reasonable terms, conditions,

and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
Chairman.

(Seal)

Attest:

(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:

(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended).

PAN AMERICAN AIRWAYS, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics

Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transpportation with respect to persons, property and mail, as follows:

(a) Between the terminal point Miami, Fla., the intermediate points Camaguey and Santiago, Cuba, Port-au-Prince, Haiti, Ciudad Trujillo, Dominican Republic, San Juan, Puerto Rico, Charlotte Amalie (St. Thomas), Virgin Islands, St. Johns, Antigua, Pointe a Pitre, Guadeloupe, Ft. de France, Martinique, Port of Spain, Trinidad, Georgetown, British Guiana, Paramaribo, Surinam (Dutch Guiana), Cayenne, French Guiana, Belem (Para), Sao Luiz (Maranhao), Camocim, Fortaleza, Areia Branca, Natal, Recife (Pernambuco), Maceio, Aracaju, Sao Salvador (Bahia), Caravellas, Victoria, Rio de Janeiro, Sao Paulo, and Porto Alegre, Brazil, Montevideo, Uruguay, and the terminal point Buenos Aires, Argentina; and also between the intermediate point Rio de Janeiro, Brazil, the intermediate points Sao Paulo, Curityba, Iguassu Falls, Brazil, and Asuncion, Paraguay, and the terminal point Buenos Aires, Argentina; and also between the intermediate point Ciudad Trujillo, Dominican Republic, and the terminal point Caracas, Venezuela; and also between the intermediate points Belem (Para), Brazil, the intermediate point Barreiras, Brazil, and the intermediate point Rio de Janeiro, Brazil; and also between the intermediate point Port-au-Prince, Haiti, the intermediate point Santiago, Cuba, and the terminal point Kingston, Jamaica.

(b) Between the terminal point Miami, Fla., the intermediate point Havana, Cuba, and the terminal point Merida, Mexico.

(c) Between the terminal point Miami, Fla., the intermediate points Cienfuegos, Cuba, and Kingston, Jamaica, and the terminal point Balboa, Canal Zone; and also between the intermediate point Kingston, Jamaica, and the terminal point Barranquilla, Colombia.

(d) Between the terminal point Miami, Fla., the intermediate point Cat Cay, Bahama Islands (except with respect to mail) and the terminal point Nassau, Bahama Islands.

(e) Between the terminal point Houston, Tex., the intermediate points Corpus Christi and Brownsville, Tex., Tampico, Mexico City, and Tapachula, Mexico, Guatemala City, Guatemala, San Salvador, El Salvador, Tegucigalpa, Republic of Honduras, Managua, Nicaragua, San Jose, Costa Rica, and David, Panama, and the terminal point Balboa, Canal Zone (Ancon, Canal Zone or Panama City, Panama).

(f) Between the terminal point Balboa, Canal Zone, the intermediate points Barranquilla, Colombia, Maracaibo, Coro, Caracas, Barçelona, and Maturin, Venezuela, and the terminal point Port of Spain, Trinidad.

(g) Between the terminal point New York, N. Y., and the terminal point San Juan, Puerto Rico.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board. The holder may

(1) begin or terminate or begin and terminate trips at points short of terminal points; (2) continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the date of issuance of this certificate, as amended; and (3) continue to maintain regularly scheduled non-stop service between any two points not consecutively named herein, if non-stop service was regularly scheduled by the holder between such points on the date of issuance of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled non-stop service between any two points not consecutively named herein between which such service is authorized hereby. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign county, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to be affixed hereto,

attested by the Secretary of the Board on this the 17th day of May, 1946.

(S.) L. WELCH POGUE,
Chairman.

(Seal)

Attest:

(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:

(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended).

PAN AMERICAN AIRWAYS, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the co-terminal points New Orleans, La., and Houston, Tex., the intermediate point Merida, Mexico, and the terminal point Guatemala City, Guatemala.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of

service may be authorized by the Board. The holder may (1) begin or terminate or begin and terminate trips at points short of terminal points; (2) continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the date of issuance of this certificate, as amended; and (3) continue to maintain regularly scheduled non-stop service between any two points not consecutively named herein, if non-stop service was regularly scheduled by the holder between such points on the date of issuance of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled non-stop service between any two points not consecutively named herein between which such service is authorized hereby. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign county, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate, as amended, shall be subject to (1) the condition that the holder shall not carry persons, property, or mail which, with respect to the points named herein, originate at New Orleans and terminate at Houston, or originate at Houston and terminate at New Orleans and (2) such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
(as amended).

PAN AMERICAN-GRACE AIRWAYS, INC.,
is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics

Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

(a) Between the terminal point Balboa, Canal Zone, the intermediate points Cali, Colombia, Quito, Esmeraldas, Manta, Salinas, and Guayaquil, Ecuador, Talara, Chiclayo, Lima, and Arequipa, Peru, Arica, Antofagasta, and Santiago, Chile, Mendoza, Cordoba, and Buenos Aires, Argentina, and the terminal point Montevideo, Uruguay.

(b) Between the intermediate points Arequipa, Peru, Africa, Chile, La Paz, Oruro, and Uyuni, Bolivia, Salta, Tucuman, Cordoba, and Buenos Aires, Argentina, and the terminal point Montevideo, Uruguay.

(c) Between the intermediate points Arequipa, Peru, Arica, and Antofagasta, Chile, Salta, Tucuman, Cordoba, and Buenos Aires, Argentina, and the terminal point Montevideo, Uruguay.

(d) Between the intermediate points Guayaquil, and Cuenca, Ecuador, and the terminal point Loja, Ecuador.

(e) Between the intermediate points Oruro, Cocha-bamba, Sucre, Vallegrande, Santa Cruz, Concepcion, San Ignacio, San Jose, Robore, Puerto Suarez, Bolivia, and the terminal point Corumba, Brazil.

(f) Between the intermediate point Quito, Ecuador, and the terminal point Ipiales, Colombia.

(g) Between the intermediate points Lima, Peru, Juanjui, Peru, and the terminal point Iquitos, Peru.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board. The holder may (1) begin or terminate or begin and terminate trips at points short of terminal points; (2) continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the date of issuance of this certificate, as amended; and (3) operate the nonstop service authorized in the order of the Board authorizing the amendment of this certificate, and continue to maintain regularly scheduled nonstop service between any two points not consecutively named herein, if non-stop service was regularly scheduled by the holder between such points on the date of issuance of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service hereinabove expressly prescribed, regularly serve a point named herein through any airport convenient thereto, and render scheduled nonstop service between any two points not consecutively named herein between which such service is authorized hereby. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign county, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal or terminals named herein, or serve regularly a point or points in such foreign country in addition to those named herein.

The exercise of the privileges granted by this certificate, as amended, shall be subject to the conditions (1) that flights serving Montevideo, Uruguay, shall originate or

terminate at Santiago, Chile, or points north thereof, or at Salta, Argentina, or points north thereof, and (2) such other reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman and the seal of the Board to be affixed hereto, attested by the Secretary of the Board on this the 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.

WESTERN AIR LINES, INC.,

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics

Act of 1938, as amended, and the orders, rules, and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

Between the terminal point Los Angeles, Calif., and the terminal point Mexico City, Mex.

The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may, in addition to the service herein expressly prescribed, regularly serve a point named herein through any airport convenient thereto. Upon compliance with such procedure as may be prescribed by the Board, the holder may, when required to do so by any foreign country, service to which is authorized hereby, serve such country regularly through a terminal or terminals within such country other than the terminal named herein, or serve regularly a point or points in such foreign country in addition to that named herein.

The exercise of the privileges granted by this certificate, shall be subject to such reasonable terms, conditions, and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate shall be effective from the date of its approval by the President of the United States.

In Witness Whereof, the Civil Aeronautics Board has caused this certificate to be executed by its Chairman

and the seal of the Board to be affixed hereto, attested by the Secretary of the Board, on this 17th day of May, 1946.

(S.) L. WELCH POGUE,
(Seal) Chairman.

Attest:
(S.) FRED A. TOOMBS,
Secretary.

The White House,
Approved:
(S.) HARRY S. TRUMAN.
May 22, 1946.

Original Received, Docket Section, Proceedings Division, June 24, 10:24 A. M. '46, Economic Bureau, Civil Aeronautics Board.

Civil Aeronautics Board,
Washington, D. C.

In the Matter of the Application of Waterman Steamship Corporation for a certificate of public convenience and necessity under Section 401 of the Civil Aeronautics Act, 1938, as amended.

Docket No. 525 et al.

PETITION FOR REHEARING AND RECONSIDERATION FILED BY WATERMAN STEAMSHIP CORPORATION.

Communications with respect hereto should be addressed to:

Bon Geaslin,
Vice President and General Counsel,
Waterman Steamship Corporation,
520 Investment Building,
Washington 5, D. C.

Civil Aeronautics Board,
Washington, D. C.

In the Matter of the Application of Waterman Steamship Corporation for a certificate of public convenience and necessity under Section 401 of the Civil Aeronautics Act, 1938, as amended.

Docket No. 525 et al.

PETITION FOR REHEARING AND RECONSIDERATION.

Waterman Steamship Corporation (hereinafter referred to as "petitioner") an applicant in the above-entitled proceeding, hereby respectfully petitions the Civil Aeronautics Board (hereinafter referred to as the "Board") for a rehearing and reconsideration of—

(a) So much of the Board's Order, Serial No. 4793, and the attached opinion as denies the application of petitioner for a certificate of public convenience and necessity, authorizing air transportation of persons and property (except mail) between the terminal points of New Orleans, Louisiana and San Juan, Puerto Rico, via such intermediate point or points as the Board might designate, or to such other termini beyond New Orleans and beyond San Juan as the Board may designate, and

(b) So much of the Board's Order, Serial No. 4793, and attached opinion as grants to Chicago & Southern Airlines, Inc. (hereinafter referred to as "C & S"), a certificate of public convenience and necessity authorizing it to engage in air transportation with respect to persons, property and mail between the co-terminal points New Orleans, Louisiana, and Houston, Texas, the intermediate point Havana, Cuba, and beyond Havana, the intermediate points Camaguey, Cuba, Port au Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point, San Juan, Puerto Rico, and

(c) For a reconsideration of the Board's Order, Serial No. 4795, denying motion of petitioner to reopen the proceeding and receive further evidence and for a reargument, and

(d) For a rehearing and reconsideration of so much of the opinion in this case as states that in determining the question of public convenience and necessity, and the fitness, willingness, and ability, raised by the application of a steamship company under Section 401 of the Civil Aeronautics Act of 1938 (hereinafter referred to as the "Act"), such applicant is required to comply with the provisions of Section 408 (b) of the Act, relating to the acquisition of control of an air carrier by a common carrier, not an air carrier.

In support hereof, petitioner respectfully shows:

(1) That on December 19, 1940, Waterman Airline, Inc., a subsidiary of petitioner, filed its application with the Board under the provisions of Section 401 of the Act, for a certificate of public convenience and necessity, authorizing it to engage in scheduled air transportation of persons and property between the terminal points of New Orleans, Louisiana, and San Juan, Puerto Rico, via the intermediate point, Tampa, Florida. Subsequently, by permission of the Board, the application was amended by substituting the Waterman Steamship Corporation as the applicant, and modifying the proposed route, as stated above.

(2) That the Board arbitrarily, capriciously, and in disregard of the provisions of Section 401 (c) of the Act, failed and refused to set the application for hearing and speedily dispose of such application as required by law.

(3) That on or about December 17, 1941, the Board announced the suspension of hearings on all new route applications for the reason that the United States was at war.

(4) That on or about December 6, 1943, approximately three years after petitioner's application was filed, the Board over the protest of petitioner, arbitrarily consolidated for hearing, under Docket No. 525, et al., all applications which had been filed for certificates of public convenience and necessity authorizing air transportation services on all routes between the United States, Mexico, Central America, South America and the Caribbean area.

(5) That the hearings on such applications were held before the Examiners of the Board in September and October, 1944, while the United States was still at war, which fact prevented the presentation of evidence by petitioner or any other applicant as to when equipment could be obtained for the inauguration of services applied for, as well as other evidence material to the issues herein.

(6) That the report of the Examiners was served on petitioner March 5, 1945; that on March 20, 1945, petitioner filed its exceptions to the Examiners' report and the applications were argued and submitted to the Board in May, 1945.

(7) That the opinion and order of the Board, referred to above, were served upon petitioner on May 24, 1946.

(8) That the order of the Board denied petitioner's application, as aforesaid, and granted a certificate of public convenience and necessity to C & S, as aforesaid, on the alleged ground that the selection of that company would result in a pattern of air transportation best suited to the development of the maximum volume of traffic; that there is no evidence to support such finding and conclusion, but it is contrary to the evidence.

(9) The findings, conclusions and decisions of the Board that the service proposed by Waterman would necessarily be limited to the transportation of passengers between New Orleans and Tampa and Havana, and San Juan, is not supported by any evidence, but, in fact, is contrary to the evidence.

(10) The findings, conclusions and decisions of the Board that it is not likely that the New Orleans-San Juan service will require any substantial subsidy payment, if it is conducted as a part of an independent airline system, is not supported by any evidence, but is contrary to the evidence submitted by C & S itself.

(11) The findings, conclusions and decisions of the Board that the service proposed by Waterman would require all passengers bound for or coming from points in the interior to change planes at New Orleans and Tampa is not supported by the evidence but is contrary to the evidence, in that under Waterman's application, the Board specifically states that petitioner's application was sufficiently broad to authorize the Board to prescribe a terminal point beyond New Orleans.

(12) Although Section 401 (d) (1) authorizes the Board to issue a certificate of public convenience and necessity only if it finds that the applicant is fit, willing and able to perform the transportation properly, the Board made no finding in its decision or order that C & S is fit, willing and able to perform the air transportation service authorized, as aforesaid.

(13) There is no evidence to support a finding by the Board that C & S is fit, willing and able to perform that portion of the transportation authorized, as aforesaid, but such a finding, if it had been made, would have been con-

trary to the evidence. The Board made no finding that the financial resources of C & S were adequate to enable it to acquire the number and type of aircraft necessary to inaugurate and maintain the transportation authorized, as aforesaid.

(14) The Board, as one of the grounds for denying the motion of petitioner to reopen the proceeding and to receive further evidence and for reargument, stated that evidence relating to air traffic during the war period, and the present transition period, does not form a sufficient basis to warrant the reopening of the proceeding "particularly in view of the delay which would result and which would interfere with the institution of new services to Puerto Rico and other points, and that it is in the public interest to issue, as promptly as possible, a decision in this proceeding"; that after a delay of five and one-half years in deciding petitioner's application, the Board, by its order complained of herein, issued a certificate to C & S which petitioner will show, upon a rehearing and reconsideration of the order herein, does not have the equipment, organization and personnel to inagurate the service authorized, as aforesaid, and will not be able to do so for a period of several months, if at all.

(15) Upon a rehearing, petitioner will show that it has the equipment, organization and personnel to inaugurate immediately, and maintain an air transportation service over said route at a date not later than July 1, 1946, if authorized by the Board.

(16) The evidence discloses that C & S, has been unable to operate profitably in interstate commerce under the certificates of public convenience and necessity heretofore issued to it, but that it has required a subsidy in the form of airmail compensation in order to enable it to

maintain services over the routes specified in its certificates; that the service provided by C & S over such routes in interstate commerce has not been adequate to meet the public need and C & S has not provided the communities served by it with adequate, economical and efficient service at reasonable charges.

(17) There is no evidence to support the findings, conclusions and decision of the Board that the estimated operating revenues in the service authorized by C & S, as aforesaid, are sufficient to meet a substantial portion of the operating costs of the proposed service, but, on the contrary, the evidence affirmatively shows that there will be imposed upon the government, in the form of airmail compensation, an unduly large proportion of the total operating costs of C & S over said route.

(18) That the estimates of capital expenditures necessary to the inauguration of the service and the operating revenues to be derived from it are so flagrantly erroneous as to be of no value as evidence upon which the Board could base its finding that public convenience and necessity requires the issuance of the Certificate to C & S, as aforesaid, and therefore the Board is without evidence to support such finding.

(19) In determining whether an applicant is fit, willing and able to perform the transportation authorized and the public convenience and necessity for such authorization, the statute requires the Board to consider the need of such carrier for compensation for the transportation of mail to insure the performance of such service; that the Board has interpreted the statute to require it to ascertain, within reasonable limitations, the cost to the government of the proposed operation in the form of airmail compensation, and that the relationship between

estimated commercial revenues and operating costs should not initially impose upon the government an unduly large proportion of the total operating cost.

(20) There is no evidence before the Board as to the amount of airmail compensation which will be required by C & S in order to insure the inauguration and maintenance of a service authorized as aforesaid and the Board failed and refused to require the submission of such evidence, without which the Board is wholly unable to determine that public convenience and necessity requires the issuance of such certificate to C & S.

(21) That the Board erred in failing to require C & S to furnish proof as to the rate of mail pay compensation and the amount thereof, which will be required to insure the inauguration and maintenance of the service authorized, as aforesaid, and in sustaining the objections to questions by petitioner as to the rate and amount of airmail compensation which would be so required by C & S, and by failing and refusing to require such proof, without which there is no evidence to support the Board's findings.

(22) That Waterman proposed to inaugurate and maintain the service applied for without the payment by the United States of airmail compensation and without any cost to the government; that in the absence of proof as to the amount of airmail compensation which will be required by C & S, there is no evidence to support the findings of the Board that the public convenience and necessity required the issuance of the certificate aforesaid to C & S, but on the contrary, the evidence of public convenience and necessity requires the issuance of such certificate to petitioner.

(23) That the findings, conclusions and decision of the Board that public convenience and necessity require the issuance of the certificate aforesaid to C & S is contrary to and in conflict with the evidence of record herein and is not supported by substantial evidence, or any evidence at all.

(24) That the so-called estimates of operating revenues submitted by C & S are without any foundation in fact, and are contrary to the operating experience of C & S; that so-called estimates of operating expenses are admittedly so completely erroneous as to have no value whatsoever, as evidence to support the findings and conclusions of the Board; that such estimates are not sound estimates of a prudent business organization willing to risk its own capital in inaugurating and maintaining the service authorized without a government subsidy in the form of air mail compensation. Such estimates were submitted for the purpose of having the Board find that the relationship between the estimated commercial revenues and operating costs of the proposed service would not impose upon the government an unduly large proportion of the total operating costs; that, in fact, C & S would not be willing to inaugurate and maintain such service without subsidy, there will be imposed upon the government an unduly large proportion of the total operating cost.

(25) There is no evidence to support the findings, conclusions and decision of the Board that the ability of C & S to develop the service authorized as aforesaid, has been adequately demonstrated. In fact, the evidence shows that C & S has no organization or personnel in any of the areas which it is authorized to serve as aforesaid, outside the continental limits of the United States; that it has had no experience in commercial air trans-

portation operation outside the continental limits of the United States, and is not familiar with the customs of the people or the trade requirements of such areas authorized to be served by it.

(26) There is no evidence to support the findings, conclusions and decision of the Board that C & S "will have every possible incentive to develop to the maximum the potential market for air transportation". In fact, the Board might reasonably assume, as it did (without any evidence) with respect to petitioner that the primary interest of C & S will be in maintaining routes it is authorized to serve in interstate commerce where its investments have already been made and that therefore "the transportation activities offering the larger investment interest may be expected to dominate". The evidence shows that C & S has made no contribution to the economic and social development of the areas outside the continental limits of the United States to which service is authorized, as aforesaid, and has had no experience in the transportation or trade in such areas; that on the other hand the petitioner has had years of experience in the operation of a transportation service to the areas in the Caribbean which C & S is authorized to serve, as aforesaid, and has adequate traffic and solicitation organization in such areas.

(27) Petitioner avers that as between an applicant who proposes to inaugurate and maintain an air transportation service without any subsidy from the United States in the form of airmail compensation, and whose financial resources and transportation experience are shown to be adequate for such purpose, and an applicant whose financial resources are such that the proposed service must be supported by the payment of airmail compensation, and which applicant was unable to, and did

not submit evidence for the Board's consideration as to the amount of such airmail compensation which would be so required, the public convenience and necessity would require the issuance of the certificate to the former under previous decisions of the Board, particularly in *Pennsylvania Central Airlines Corporation*, 2 C. A. B. 207, and *Northwest Airlines, Inc.*, 1 C. A. A. 573.

(28) That the Board, while purporting to base its decision upon "considerations of the public interest and public policy" stated that in determining "public convenience and necessity" the Act requires a steamship company applying for a certificate under Section 401, to submit evidence to meet the requirements of Section 408 (b) relating, not to the public convenience and necessity, but solely to restrictions and conditions under which the Board is authorized to approve acquisition of control of an air carrier by a common carrier, not an air carrier.

(29) Petitioner avers that although the Board disclaimed the necessity of deciding whether the petitioner had met the requirements of Section 408 (b) of the Act, the opinion of the Board, and public statements since the decision herein, of Oswald Ryan, a member of the Board, clearly show that petitioner was denied a certificate solely on the ground that it was a steamship company, and that in an application for a certificate of public convenience and necessity under Section 401, must meet the requirements of Section 408 (b) which provisions are not applicable to applicants under Section 401. Throughout the opinion, it is asserted by the Board that petitioner, although its application is filed under Section 401, is required to meet the provisions of Section 408 (b) which prescribe conditions under which a common carrier, other than an air carrier may lawfully acquire con-

trol of an air carrier. Petitioner believes and, therefore, avers that had the Board made its decision as required under Section 401 of the Act, without regard to the provisions of Section 408, that the Board would have been required to find on the evidence that public convenience and necessity required the issuance of a certificate to petitioner; that the Board, while purporting to base its decision upon the comparative qualifications of the various applicants, its decision against petitioner in fact resulted from its erroneous construction of the law that the provisions of Section 408 (b) of the Act, are applicable to petitioner in its application for a certificate under Section 401.

(30) Petitioner avers that the provisions of Section 1006 of the Act, providing for a judicial review of the orders of the Board, contemplate that the Board shall decide the legal issues involved in an application, in such manner that the aggrieved applicant may obtain a fair judicial review and determination thereof; that the statement of the Board, in its opinion, purporting to base its findings, conclusions and decision upon the comparative qualifications of the various applicants (which, according to the Board, eliminates the necessity of deciding the legal question involved) may have the effect of preventing petitioner from obtaining a judicial review and determination on the question which, on the face of the opinion, actually controlled the decision of the Board in denying a certificate to petitioner, namely, whether the provisions of Section 408 (b) of the Act are to be applied to a common carrier other than an air carrier, which makes application for a certificate of public convenience and necessity under Section 401.

(31) Petitioner avers that in a document entitled "Excerpt from address of Oswald Ryan, Vice Chairman, U.

S. Civil Aeronautics Board, before the Association of Commerce, New Orleans, Louisiana, Thursday noon, June 20, 1946," released by the Board, the following statements appear:

"Congress, intending to safeguard against any misconstruction of the Act to the injury of interested parties, has provided a remedy which gives any aggrieved parties the right to appeal from the Board's interpretation to any one of the United States Circuit Courts of Appeals. This provision gives to any shipping company or other aggrieved party a clear opportunity to have the Court set this Board right whenever it may have gone wrong in misinterpreting the intent of the Congress in the Civil Aeronautics Act.

"But no surface carrier aggrieved by the past decisions of the Civil Aeronautics Board in this respect has ever asked a United States Court to order the Board to correct its alleged misinterpretation of the intent of Congress. A Court review of this question would forever lay at rest this charge that this Board has misconstrued the intent of Congress. If the Board has erred in this matter it can and should be promptly corrected by a direct Court review at the request of the injured party."

(32) Thus a member of the Board who participated in the findings, conclusions and decision in this case asserts in effect that the decision herein, denying petitioner's application, was based upon the Board's determination that the provisions of Section 408 (b) of the Act must be applied in determining the public convenience and necessity upon an application filed under Section 401 of the Act by a common carrier other than an air carrier; that the Board member suggested in his public address that petitioner and other steamship companies

aggrieved by such misconstruction of the law, might "forever lay at rest this charge" by obtaining a direct Court review, although in its oponion, the Board disclaimed the necessity of deciding that issue, and by such action, may have prevented "a direct Court review of the request of the injured party".

(33) The Board erred in denying the motion of petitioner to reopen the proceeding and to receive further evidence and for reargument, filed with the Board on May 6, 1946, before the decision and order of the Board herein. The facts, forming the basis of such motion, are set forth therein and are made a part hereof by reference.

(34) The denial of said motion by the Board deprived the petition of a hearing on its application, as provided by law, in that no opportunity was afforded to present evidence of the changed conditions and circumstances as set forth in said motion.

Wherefore, for the foregoing reasons, petitioner prays that the Board grant a reconsideration and rehearing of its application herein, and for such other and further relief as the Board may deem just and proper.

Respectfully submitted,

WATERMAN STEAMSHIP CORPORATION,

By C. B. WATERMAN,

(C. B. Waterman)

Vice President.

BON GEASLIN,

(Bon Geaslin)

STERLING F. STOUDENMIRE, JR.,

(Sterling F. Stoudenmire, Jr.)

Counsel for Waterman Steamship Corporation.

237 VERIFICATION.

District of Columbia, ss.

C. B. Waterman, being duly sworn, deposes and says that he is a Vice President of the Waterman Steamship Corporation; that he has read and is familiar with the contents of the foregoing petition; that he is familiar with the facts therein set forth, and that to the best of his information and belief, every statement contained in said petition is true.

C. B. WATERMAN.
(C. B. Waterman)

Subscribed and sworn to before me this 22nd day of June, 1946.

ADRIANNE VERNON,
(Adrianne Vernon)
Notary Public.

My commission expires January 19, 1948.

238 CERTIFICATE OF SERVICE.

I hereby certify that I have this day served the foregoing petition upon all parties who appear of record in Docket Nos. 525, et al., by causing copies thereof properly addressed to be mailed to the attorneys for each of such parties.

BON GEASLIN.
(Bon Geaslin)

Dated, June 22, 1946.

Received Docket Section, Proceedings Division, Jul. 9, 3:47 PM, '46, Economic Bureau, Civil Aeronautics Board.

239 Before the
Civil Aeronautics Board.

In the Matter of the Applications for certificates of public convenience and necessity authorizing additional air service to Latin America, known as the Latin American Service Case.

Docket No. 525, et al.

ANSWER OF CHICAGO AND SOUTHERN AIR LINES, INC. TO PETITION OF WATERMAN STEAMSHIP CORPORATION FOR REHEARING AND RECONSIDERATION.

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July 9, 1946.

240 Before the
Civil Aeronautics Board.

In the Matter of the Applications for certificates of public convenience and necessity authorizing additional air service to Latin America, known as the Latin American Service Case.

Docket No. 525, et al.

ANSWER OF CHICAGO AND SOUTHERN AIR LINES, INC., TO PETITION OF WATERMAN STEAMSHIP CORPORATION FOR REHEARING AND RECONSIDERATION.

Now comes, Chicago and Southern Airlines, Inc. (hereinafter referred to as "C & S") by its attorneys and sub-

mits this, its answer, to the petition for rehearing and reconsideration heretofore filed in the above entitled proceeding on June 24, 1946, by Waterman Steamship Corporation (hereinafter referred to as "Waterman"). The said petition of Waterman asked for rehearing and reconsideration of

(a) So much of the Board's order, Serial No. 4793 as denies the application of Waterman in Docket No. 525;

(b) So much of the Board's order, Serial No. 4793 as grants to C & S a certificate of public convenience and necessity authorizing air transportation with respect to persons, property and mail between the co-terminal points New Orleans, La., and Houston, Texas, the intermediate point Havana, Cuba and beyond Havana, the intermediate points Camaguey, Cuba, Port au Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, P. R.

(c) So much of the Board's order, Serial No. 4795 as denies the motion of Waterman to reopen the proceeding for the receipt of further evidence and for re-argument;

(d) So much of the Board's opinion in the above entitled proceeding as expresses an opinion with respect to the applicability of the provisions of Section 408 (b) of the Act to applications of steamship companies under Section 401 of the Act.

By way of answer C & S admits the allegations contained in Paragraphs (1), (3), (6), and (7) of Waterman's petition.

By way of further answer C & S denies all and sundry the conclusions of law and of fact contained in the remaining numbered paragraphs of the said petition of Waterman, although recognizing that certain of the state-

ments of fact upon which the conclusions are based are true and must be admitted.

Argument.

The following paragraphs of Waterman's petition are devoted to the proposition that the selection of C & S rather than Waterman to operate a route between New Orleans and San Juan is not sustained by the evidence of record, i. e. Paragraphs, (8), (9), (10), (11), (12), (13), (14), (15), (16), (17), (18), (19), (20), (21), (22), (23), (24), (25), (26), and (27). Paragraphs numbered (28), (29), (30), (31) and (32) of Waterman's petition for rehearing and reconsideration present the question of the legality of the Board's decision that in a case under Section 401 of the Act the Board is required to apply the standards contained in Section 408 (b) of the Act to an application filed by a common carrier other than an air carrier. Paragraphs (33) and (34) of the said petition of Waterman involve a renewal of Waterman's motion of May 6, 1946 for reopening of the record in the above entitled case for the purpose of taking additional testimony. These three phases of the Waterman petition will be treated separately in this answer in the foregoing order.

I. *The Record Amply Supports The Selection of C & S Rather Than Waterman to Operate Between New Orleans, La., and San Juan, P. R.*

The first argument advanced by Waterman in support of its proposition that the choice of Waterman rather than C & S as the operator of a New Orleans-San Juan route is more in accordance with the public convenience and necessity is the fact that C & S has no great advantage in its ability to operate through service between points on its domestic system and San Juan. We submit

that the ability of C & S to operate such through service is entitled to even greater weight than that which was accorded to it by the Board in its opinion. The Board has always recognized that the traveling public prefers through one-plane service to connecting service and has regarded the establishment of the former type of service as desirable whenever possible.* Therefore, it is likely that C & S would be able to obtain a greater percentage of the traffic between San Juan and such other cities as Memphis, St. Louis and Chicago than would Waterman. Each of these three cities is served by Eastern and would have the advantage of through services to San Juan over Eastern's routes. Unless a competitor of Eastern were able to operate through the New Orleans gateway through service from Chicago, St. Louis and Memphis to San Juan the bulk of such traffic would be certain to choose the services of Eastern. A New Orleans-San Juan service which would not serve interior cities would have to rely entirely upon connecting traffic between San Juan and points beyond New Orleans. The well known antipathy of the public to connecting service would logically result in the failure of a New Orleans-San Juan route to attract its fair proportion of the available traffic is such a route were operated otherwise than in conjunction with a domestic air carrier's existing route system.

Waterman denies the efficacy of this argument and states that its application is sufficiently broad to authorize the Board to prescribe a terminal point beyond New Orleans. Regardless of what terminal point beyond New Orleans the Board should select Waterman would be at a disadvantage as compared with C & S unless the Board should in this case establish a domestic system for Waterman which would complement a New Orleans-San Juan route. The fact that the Board might be free

* See Braniff Airways, Inc., Houston-Memphis Service, 2 C. A. B. 353, and subsequent cases.

to choose an appropriate terminal if it should decide to select Waterman to operate a route between the United States and San Juan is not in any sense an answer to the fundamental proposition that a carrier operating through service between points on a widespread domestic system and a point outside the United States has a greater traffic generating ability just because of this fact. Moreover, the established reputation of C & S in the domestic air travel market gives it a substantial advantage in foreign service over another applicant which is a stranger to the great mass of the American people who have come to rely upon air transportation as the most modern means of getting from one point to another. All of these factors amply support the Board's conclusion that the selection of C & S would be most appropriate to develop the maximum volume of traffic between the areas served by the New Orleans gateway and San Juan and intermediate points enroute. The primary purpose of establishing the New Orleans gateway is to serve the Mississippi Valley area which has historically regarded New Orleans as its gateway to the South. Certainly C & S can serve the traffic from that Mississippi Valley area to San Juan and other Caribbean points much more effectively by a through service than can Waterman by connecting services.

II. *The Record Amply Demonstrates That C & S Is More Fit, Willing and Able to Operate a New Orleans-San Juan Route Than Is Waterman.*

After concluding that C & S is the appropriate carrier to operate a route between New Orleans and San Juan the Board found at Page 71 of its opinion that each of the applicants whose applications were granted in whole or in part was fit, willing, and able to perform the air transportation authorized, thereby finding that

C & S was fit, willing and able to operate the route between New Orleans and San Juan. Waterman contends that the record will not sustain this finding with respect to C & S. The complete lack of understanding of the meaning of the words "fit, willing and able" contained in Section 401 (d) of the Act which is evidenced by this contention of Waterman is typical of its misunderstanding of the issues involved in this case.

C & S commenced operations on Route No. 8 between Chicago, Illinois and New Orleans, La., in 1934, pursuant to a contract between it and the Postmaster General for the carriage of mail on that route. It has continuously operated Route No. 8 from that date to the present time without any interruption in service and throughout all of those years has constantly increased the quantity and improved the quality of the service which it has offered to the public. Various additions to the system of C & S have been made by the Civil Aeronautics Board since 1938 notably in two decisions which authorized C & S to operate between Detroit and Houston via Memphis and other points as Route No. 53.* Throughout all of these years continually increasing patronage has been the reward of C & S for its efforts to serve the public in the best manner possible. It is respectfully contended that its long record of successful operation in domestic service conclusively demonstrates the fitness and ability of C & S to operate the extensions of its system granted by the Board in its opinion in the *Latin American case.* Support for this proposition is found in *Uraba, Medellin and Central Airways, Inc., Canal Zone-Colombia operation,* 2 C. A. B. 344, 342, wherein the Board stated that an air carrier applicant's fitness and

* Braniff Airways, Inc., Houston-Memphis Operation, 2 C. A. B. 353, and Transcontinental & Western Air, Inc., Detroit-Memphis Service, 6 C. A. B. 117.

ability "may be conclusively presumed from applicant's past record of service and continuous operation".

Waterman's further contention that C & S does not have idle money in the bank with which to purchase for cash the necessary aircraft and other equipment to be used in its foreign operations is immaterial to the issues in this case. Since the decision in this case C & S has put into operation four (4) new four-motor aircraft, and it can without question adequately finance the purchase of additional aircraft. However, the Board has consistently held that the possession of sufficient cash or the necessary equipment to commence service is not necessary to sustain a finding that an applicant for a certificate is fit, willing and able to perform the service propose. *American Export Airlines, Inc., Trans-Atlantic Service*, 2 C. A. B. 16 (1940). The Board was affirmed in this proposition by the opinion of the Circuit Court of Appeals of the Second Circuit in *Pan American Airways, Inc., vs. Civil Aeronautics Board*, 121 F. (2d) 810, and again by the United States Court of Appeals for the District of Columbia on appeal from the decision granting a certificate to Essair, Inc., in *Braniff Airways, Inc., v. Civil Aeronautics Board*, 147 F. (2d) 152. Therefore whether or not C & S had at the time of hearing or at the time of the decision sufficient aircraft and other equipment to operate the new route or sufficient cash to purchase the necessary equipment is immaterial to a finding that it is fit and able to operate the service authorized by the Board.

C & S denies that its inauguration of service between New Orleans and San Juan will be delayed for the length of time alleged by Waterman in its petition. On the contrary C & S alleges that having competent experienced personnel and the necessary organization it will be able

to commence operations many months before Waterman could possibly construct an organization, acquire the necessary equipment and personnel and satisfy the exacting standards of the Civil Aeronautics Administration so as to permit it to commence scheduled service between New Orleans and San Juan.

The fact that C & S has no organization or personnel in the areas outside of the United States which it has been authorized to serve is immaterial, for it has in its employ sufficient experienced personnel who may be transferred to points on the New Orleans-San Juan route with a minimum of delay. Likewise the fact that C & S has never operated within the area it has been authorized to serve is immaterial because its fitness and ability to conduct an adequate air transportation service has been completely demonstrated by its experience in domestic operation. The experience of Waterman in operating a steamship service between New Orleans and San Juan is more than offset by the complete lack of experience in air transportation which experience C & S has to the ultimate degree.

The fact that C & S already has substantial investments in its domestic system will not induce it to prefer its domestic service to the detriment of its foreign service for it fully expects to have as large if not larger investments in its foreign service after it commences operations as it now has or will have in its domestic service. Naturally the two services being complementary and not competitive C & S will attempt to obtain the greatest return possible from both services. On the other hand the steamship service of Waterman would be competitive with its proposed air service and it would reasonably be expected to prefer its steamship service in which it has and would have much more substantial investments.

III. *The Amount of Mail Compensation Involved in the Authorization of C & S is Only One of Several Elements to be Considered.*

The petition of Waterman for rehearing and reconsideration proceeds upon the premise that the controlling factor in choosing between two applicants to perform an air transportation service is the amount of mail compensation which the Government might have to pay for the performance of the service. The Civil Aeronautics Act of 1938 in Section 406 contemplates the payment of what has been referred to as a subsidy rate of mail compensation whenever more than a compensatory rate for the transportation of mail is needed to permit an air carrier to break even and earn a reasonable return on its operations. This is a determination of policy by Congress and is founded upon a recognition of the importance of an adequate air transportation system to the commerce of the United States, the Postal Service and the National Defense.

There is nothing in the Act which expressly or by implication indicates that this Congressional policy should be ignored to the extent that the fact that one application involves no possible cost to the Government in mail compensation should be preferred over another which involves such a possibility. The very purpose of Section 406 (b) of the Act is to permit the Board to establish that pattern of air service which is most conducive to the accomplishment of the statutory purposes and which might not otherwise be possible of establishment without some such guarantee of earnings. Therefore the mere fact that a given application might involve the possibility of the payment of mail compensation by the Federal Government is not a fact which militates against the granting of that application. The amount of mail

compensation which might be involved in the operation of any proposed service is not capable of determination in advance but can only be ascertained upon the basis of experience. If a given operation is economically successful without mail compensation then all that the carrier has is a constitutional right to just compensation for the services performed for the Government in the transportation of mail. If, however, it should be conducted at a loss then and only then is the carrier entitled to a rate of compensation for the transportation of mail higher than that which would reasonably represent the value of its services to the Government.

C & S denies the allegations contained in Waterman's petition that it has been unable to operate profitably a domestic service or that it has required a subsidy in the form of mail compensation since February 1, 1943, at which date the Board fixed a compensatory rate of compensation for the transportation of mail by C & S at sixty cents (60¢) per ton mile carried.* Since that date C & S has received no subsidy from the Government in any form and has operated over its routes a profitable service, as adequate and efficient as was possible during the war years and the critical days since the end of the war. The Board well knows that C & S like every other carrier was unable through circumstances over which it had no control to provide all the service required by the travelling public during and immediately following the war years. However, C & S has added equipment to its operations to such extent that load factors being experienced indicate that present service over C & S routes Nos. 8 and 53 is now adequate. Additional equipment now on order will further improve the service being afforded by C & S.

* Chicago & Southern Air Lines, Inc., Mail Rates, 4 C. A. B. 529.

C & S also denies the allegations in the said petition of Waterman that its estimates of operating expenses and capital expenditures are inadequate in any way. C & S submits that its estimates were as complete and accurate as those submitted by any other applicant and far more realistic than the imaginary figures submitted by Waterman. Having submitted its own best estimates of operating expenses and revenues, C & S was incapable of proving in any other way the amount of mail compensation that would be required on its proposed operation. Under the provisions of Section 406 (b) of the Act C & S is unable to fix with any greater certainty the amount of mail compensation which will be required because of the fact that this Section provides that mail rates shall be determined upon the basis of experience alone. *Continental Air Lines, Inc., Denver-Kansas City Operation*, 4 C. A. B. 1, 8.

The fact that Waterman did not propose to carry mail between New Orleans and San Juan and therefore would not be eligible for mail compensation under Section 406 of the Act is an important factor militating against the granting of its application. The Board found that the public convenience and necessity required air transportation of persons, property *and mail* between New Orleans and San Juan via intermediate points. The selection of Waterman rather than C & S would have prevented the establishment of this new air mail service which the Board found to be required. Under the Act the needs of the postal service are as important in determining the requirements of the public convenience and necessity as are the needs of persons and cargo for transportation. One of the cardinal objectives of the Civil Aeronautics Act is the establishment of the system of air transportation adequate to the needs of the postal service. One of the other important objective of the Act

is the establishment of a system of air transportation adequate to the needs of the commerce of the United States. Without mail service the commerce of the United States would be greatly handicapped. Therefore the selection of one applicant rather than another simply on the basis that the former proposes mail service and the latter does not is consistent with the objects and purposes of the Civil Aeronautics Act of 1938.

Moreover, the unavailability of Section 406 of the Act as a means of sustaining the proposed operation of Waterman indicates the undesirability of selecting that applicant. There is no proof in the record that Waterman is capable of continuing indefinitely the required operation between New Orleans and San Juan at a substantial loss. The Board having found that permanent service is required on that route it would be inappropriate to select an applicant which, if faced by recurring losses, would in all probability either abandon the service or resort to unfair competitive practices in an effort to increase revenue. Therefore, it is submitted that the choice of an applicant which would engage in air transportation of mail in addition to persons and property and whose operations the Board could require to be continued forever is more consistent with public interest than the selection of an applicant which would not transport the mail and would probably abandon the service if losses were incurred over a number of years.

It is respectfully submitted that there is nothing in the Board's opinion in *Northwest Airlines, Inc.*, 1 C. A. A. 573 or in *Pennsylvania Central Airlines Corp.*, 2 C. A. B. 207 to sustain the proposition that an application not involving the transportation of mail and therefore involving no cost to the Government should be granted in preference to an application for a certificate authorizing

mail transportation with the inherent possibility of a mail pay subsidy. The question of possible cost to the Government in the form of mail compensation has already been only one element in the selection of a carrier to operate a proposed service. The Board has consistently refused to predicate its decision among conflicting applications upon the basis that one involves less mail compensation than the other and has in a line of cases commencing with *Continental Air Lines, Inc., Denver-Kansas City Operation, supra,* consistently rejected that theory. Every precedent which can be cited indicates that the amount of mail compensation involved in a particular application is only one element among many in determining which of several applicants should be chosen to perform a given service. This theory is exactly what Congress must have contemplated by the Civil Aeronautics Act for it included therein the mail pay provisions of Section 406 without including any directive that the Board wherever possible seek to eliminate the possibility of subsidy mail pay by certificating persons and property service in preference to services carrying persons, property and mail.

IV. *There Is No Appealable Error in the Board's Treatment of the Applicability of Section 408 of the Act.*

Paragraphs (28), (29), (30), (31), and (32) of Waterman's petition for rehearing and reconsideration may be summarized by saying that they contain the contention that the Board was in error in its discussion of the applicability of Section 408 of the Act to the application of a steamship company for a certificate of public convenience and necessity under Section 401 of the Act. Stripped of the immaterial allegations contained therein these five (5) paragraphs of Waterman's petition all advance the

same proposition. We submit that there was no error of law in this discussion contained at Pages 53-56 of the Board's opinion in the *Latin-American case.* This discussion in the Board's opinion is general and has no particular reference to the application of Waterman as distinct from the applications of other steamship companies.

The Board did not decide the application of Waterman upon the basis of its interpretation of the applicability of Section 408 to its application. The Board recognized in its opinion exactly what we have contended, i. e., that there are two steps involved in the disposition of an application of a steamship company under Section 401 of the Act. The first step involves a consideration of the relative merits of the application of the steamship company and those other applications proposing similar service to determine which of the conflicting applications is most in accordance with the public convenience and necessity. Secondly a determination must be made that there is or is not any legal impediment to the granting of the application of the steamship company *only if by the first step in this process the Board has tentatively decided to grant the application of the steamship company.* In this case the Board explained that it decided the first of these two questions adversely to Waterman and that, therefore, a decision with respect to the second question was unnecessary to the disposition of its application. That being so the expressions contained in the Board's opinion with respect to the legal proposition are clearly *obiter dicta.* It being unnecessary to decide the legal question involved in the applicability of Section 408 to Waterman's application, the discussion of this question contained in the Board's opinion did not add to or detract from the merits of its opinion in any way whatsoever. It is a cardinal principle that the jurisdiction of the Federal Courts is limited to "cases and

controverises," as those words are used in Article III, Section 2 of the Constitution, and that *obiter dicta* does not present any justifiable question which may be passed on by the Federal Courts on appeal. *Muskrat v. United States*, 219 U. S. 346. Therefore we submit that a steamship applicant has no status to appeal the decision of the Board in the *Latin American Case* insofar as that decision concludes that a steamship applicant under Section 401 of the Act must satisfy the restrictive conditions of Section 408 (b) of the Act as a legal prerequisite to obtaining a certificate of public convenience and necessity.

The Board clearly stated at page 60 of its opinion that in passing upon the application of Waterman it did not do so on the basis of a determination that Waterman had not satisfied the tests of the second provision of Section 408. Therefore the only question which Waterman could raise on appeal to the Courts would be with respect to the Board's finding that the public convenience and necessity required the selection of an applicant other than Waterman to operate between New Orleans and San Juan. The selection of an applicant to operate a route required by the public convenience and necessity rests almost entirely upon the informed judgment of the Board and the Board's decision will not be reversed on appeal unless it can be shown that no substantial evidence of record supports its selection. *United Air Lines, Inc. v. Civil Aeronautics Board*, Case No. 8979, decided April 22, 1946, U. S. Court of Appeals (D. C.). In cases involving foreign air transportation the right of appeal from the decision of the Board that one applicant rather than another should be selected on the basis of the facts of record is not present even though there be no substantial evidence to sustain such a finding, because in such cases the Board acts only as the advisor of the

President who is free to make the ultimate determination upon the basis of "information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted its certificates"; *Pan American Airways Company v. Civil Aeronautics Board, supra*, at p. 814. In discussing the question of the appealability of an order of the Board signed by the President by which certificates of public convenience and necessity are issued, the Circuit Court of Appeals for the Second Circuit went on to say at p. 814:

"If the President has approved of a certificate authorizing a carrier to engage in foreign air transportation and we attempted to review the order authorizing the issuance of the certificate we should be placed in a position where we might be obliged to reverse a tribunal whose subsequent action the President would decline to approve. His sweeping powers are illustrated by his duty under Section 801 not only to approve or disapprove of a certificate for foreign air transportation, but even to approve or disapprove of the denial of such a certificate by the Board. It seems incredible that in enacting Section 1006 (a) Congress intended to permit a review of the action of the Board in cases where the authority vested in the President by the Constitution to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. *United States v. Belmont*, 301 U. S. 324; *United States v. Curtiss-Wright Corp.*, 299 U. S. 304. The review of the order authorizing the issuance of the certificates is so dependent upon considerations which are within Executive discretion that it cannot be regarded as authorized by Section 1006 (a). Accordingly

the motion to dismiss the appeal is granted as to such part of the order of July 12, 1940, as authorized the issuance of the temporary certificates."

Therefore this case having been decided upon the basis of the facts presented with respect to the public convenience and necessity and not upon basis of any issue of law the President's action in approving the Board's decision renders it final and conclusive and not appealable. The discussion of the legal question involving the applicability of Section 408 of the Act to applications of steamship companies under Section 401 of the Act was immaterial to the disposition of the issues in this case which makes this case quite distinct from *Pan American Airways Company v. Civil Aeronautics Board, supra.* In the latter case the justiciable issue presented to the Court on appeal was separate and distinct from the question involved in the issuance of a certificate of public convenience and necessity to American Export Airlines, Inc., and involved a pure question of law, the disposition of which did not affect in any way the continued existence of the certificate of public convenience and necessity theretofore issued to American Export Airlines, Inc. Thus the situation in that case was far different from one in which an unsuccessful applicant raises an alleged question of law in an attempt to cancel the President's prior determination with respect to the issuance of a certificate of public convenience and necessity. We submit that even if there were merit to Waterman's contention it would have no recourse to Court action which might have the effect of cancelling an action heretofore taken by the President. We believe that any such action by a Federal Court would be beyond its constitutional authority and that regardless of the merits of its contention there is nothing which Waterman can do at law which will have the effect of either cancelling the cer-

tificate of public convenience and necessity heretofore issued to C & S or of reversing the denial of its own application.

V. The Board Properly Denied The Motion of Waterman to Reopen The Proceeding of May 6, 1946.

The last two paragraphs of Waterman's petition for rehearing and reconsideration amount to a renewal of its motion filed May 6, 1946 to reopen the proceeding to receive further evidence and for reargument. C & S filed an answer to this motion on May 16, 1946 and on May 17, 1946 the Board by Order Serial No. 4795 denied the motion. C & S hereby renews its answer of May 16, 1946 and incorporates by reference the arguments advanced therein.

As we have pointed out heretofore that the amounts of air mail compensation paid by the Government to the air line applicants in this case, the inadequacy in air line service due to wartime conditions, and the availability of personnel and equipment to inaugurate service on any proposed route are immaterial to the issues in this proceeding and therefore do not constitute good grounds for a rehearing in this case either before or after the Board's decision herein. The first two of these factors were clearly within the knowledge of Waterman at the time of the hearing and therefore are not new evidence for the receipt of which this case should be reopened. The last of these elements is so immaterial to the issues in this proceeding that evidence with respect thereto would contribute nothing in aid of a fair decision.

The only question of any substance presented by Waterman's motion of May 6, 1946 is that with respect to

the change of conditions which has occurred since the date of the hearing. The hearing of this case was held during October of 1944 and decision thereon was rendered in May 1946. The time consumed in the disposition of this case was actually a little less than 19 months. The question presented by Waterman's motion of May 6, 1946 is whether during those 19 months there was such a change in conditions prevailing throughout the world as to justify the Board or a Court in finding that the record in this proceeding no longer constitutes a basis upon which a fair decision upon the issues can be made. The only change in conditions which Waterman alleges to have transpired between the hearing and the decision in his case is the termination of the recent war. Thus the issue presented by Waterman's motion of May 6, 1946 is whether the end of the war worked such changes in general conditions as to make the record in this proceeding "stale". We submit that as a matter of fact this intervening circumstance would not have that effect upon the record for the whole record in this case was made in contemplation of the end of the war. At the time of the hearing it was a well known fact that none of the services proposed by the various applicants could be commenced prior to the termination of hostilities. All of the evidence submitted was prospective in effect, in the sense that it attempted to forecast postwar travel needs. Any evidence that would be submitted at the present time at a rehearing would also necessarily have to be prospective in character for the experience since August 16, 1945 has not been characteristic of what will prevail when the effects of the war cease to be felt.

In view of the foregoing we submit that there was no abuse of discretion involved in the Board's denial of Waterman's petition of May 6, 1946. *The Atchison, To-*

*peka and Santa Fe case** does not stand for the proposition that any time changes in economic conditions occur between the date of the hearing and the date of the decision by an administrative body a party to the proceeding is entitled to have a rehearing on demand. It is noteworthy that the *Atchison, Topeka and Santa Fe* case is the only one in which the Courts have remanded a proceeding to an administrative body for further hearing on the grounds that the administrative body abused its discretion in failing to grant a petition for rehearing. *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, 389. In fact the whole history of cases since the *Atchison, Topeka and Santa Fe* case indicates an inclination on the part of the Supreme Court to progressively restrict the doctrine of that case. In fact in *United States v. Northern Pacific Ry.*, 288 U. S. 490, the Supreme Court very shortly thereafter restricted the *Atchison, Topeka and Santa Fe* case to its special facts. It should be remembered that the special facts of the *Atchison, Topeka and Santa Fe* case involved an order by the Interstate Commerce Commission which was to be effective June 1, 1931 on the basis of a record made in 1928, that the *Atchison, Topeka and Santa Fe* case involved the exercise of rate-making power by the Interstate Commerce Commission and that a complete collapse of the economy of this country had occurred between the time the record was made and the time the decision was to be effective.

One of the most recent cases decided by the Supreme Court which involved the question of the discretion of an administrative body in denying a petition for rehearing on the grounds of changed economic conditions was *Interstate Commerce Commission v. City of Jersey City*,

* *Atchison, Topeka and Santa Fe Railway Co. v. United States*, 284 U. S. 248.

322. U. S. 504. In this case the Administrator of Price Control sought a rehearing on a rate order entered by the Interstate Commerce Commission on the basis of a record 15 months old. The hearings had been held in September 1942 and the decision was rendered on November 2, 1943. The Court held that there was no evidence of which they could take judicial notice of such a change in economic conditions as to warrant the Court interfering with the exercise of discretion by the administrative body. The following cogent observations with respect to petitions for rehearing taken from pages 514-515 of the Supreme Court's opinion in the Jersey City case are peculiarly applicable to Waterman's motion of May 6, 1946.

"One of the grounds of resistance to administrative orders throughout federal experience with the administrative process has been the claims of private litigants to be entitled to rehearings to bring the record up to date and meanwhile to stall the enforcement of the administrative order. Administrative consideration of evidence —particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it—always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening. It has been almost a rule of necessity that rehearings were not matters of right, but were pleas to

discretion. And likewise it has been considered that the discretion to be invoked was that of the body making the order, and not that of a reviewing body."

Therefore it is submitted that the Board is not bound by the decision of the Suprme Court in the *Atchison, Topeka and Santa Fe case* and need reopen the hearing herein only if in its own sound discretion it determines that changes in circumstances since the hearing have rendered the record "stale". In this connection it might be worthwhile to point out that in in *Pan American Airways Company v. Civil Aeronautics Board, supra,* the Circuit Court of Appeals for the Second Circuit decided that supposed changes in the volume of traffic between the date of the hearing and the date of the decision do not constitute a substantial basis for the reopening of the record in a case before the Board. Upon this basis, therefore, we submit that the principle of the *Atchison, Topeka and Santa Fe case* is not generally applicable to administrative proceedings, that the length of time transpiring between the hearing and decision in this case are not sufficient to work a material change in circumstances to the prejudice of any party, and that the only effect of changed circumstances would be an increase in available traffic. On the basis of these facts the Board should be governed in its disposition of Waterman's motion by the decision in *Pan American Airways Company v. Civil Aeronautics Board, supra.*

Wherefore, Chicago and Southern Air Lines, Inc., respectfully submits that the petition of Waterman Steamship Corporation for rehearing and reconsideration of the Board's opinion in the *Latin American case* should be summarily dismissed because none of the allegations of fact or of law contained therein constitutes a basis for reopening the case and because further proceedings in

this case would only delay the ultimate disposition thereof and entail a further postponement of the inauguration of greatly needed service between New Orleans, Louisiana and San Juan, Puerto Rico via intermediate points.

Respectfully submitted,

RICHARD S. MAURER,
JAMES M. VERNER,
GERALD P. O'GRADY,
Attorneys for Chicago & Southern Airlines, Inc.

Dated: July 9, 1946.

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258 CERTIFICATE OF SERVICE.

I hereby certify that the foregoing answer of Chicago & Southern Airlines, Inc., to petition of Waterman Steamship Corporation for rehearing and reconsideration has been served upon all parties to this proceeding by mailing two copies hereof to the Attorney of Record for each such party, properly addressed, postage prepaid.

Dated at Washington, D. C., this 9th day of July, 1946.

GERALD P. O'GRADY,
Attorney for Chicago & Southern Airlines, Inc.

Orders. Serial Number 4977.

United States of America,
Civil Aeronautics Board,
Washington, D. C.

At a session of the Civil Aeronautics Board held at its office in Washington, D. C. on the 12th day of July, 1946.

In the matter of the application of Waterman Steamship Corp. and other applications for certificates and amendments of certificates of public convenience and necessity, known as the Latin American Service Case.

Docket No. 525 et al.

ORDER GRANTING AND DENYING PETITIONS FOR REHEARING, REARGUMENT AND RECON-
259 SIDERATION.

Colonial Airlines, Inc., having filed on May 27, 1946, a petition for reconsideration of the order of the Board in the above-entitled matter dated May 17, 1946 (Order Serial No. 4793); Eastern Air Lines, Inc., having filed on June 21, 1946, a petition for reconsideration of said order; Pan American Airways, Inc., having filed on June 20, 1946, a petition for rehearing, reargument and reconsideration of said order; and Waterman Steamship Corporation having filed on June 24, 1946, a petition for rehearing and reconsideration of the orders of the Board dated May 17, 1946 (Order Serial No. 4793 and Order Serial No. 4795); National Airlines, Inc., having filed with the Board a conditional request for the reconsideration

of its application for a route between Miami, Fla., and Balboa, C. Z., and American Overseas Airlines, Inc., and Moore-McCormack Lines, Inc., having filed with the Board conditional requests for reconsideration of their applications;

Upon due consideration of said petitions and requests the Board finding that:

1. The matters set forth in the petitions of Colonial Airlines, Inc., and Eastern Air Lines, Inc., and in the request of National Airlines, Inc., indicate that there may be a public need for through service between Balboa, C. Z., one or more of the intermediate points Barranquilla, Colombia, Kingston, Jamaica, Havana, Cuba, and cities in the eastern part of the United States, which need may not have been adequately provided for by the aforesaid order (Order Serial No. 4793), and accordingly that reopening of the proceeding for the purpose of reargument and reconsideration with respect to the application of Colonial, Eastern and National for such service is required in the public interest;

2. The matters set forth in the petition of Pan American Airways, Inc., warrant reopening of the proceeding for the purpose of reargument and reconsideration insofar as the order therein (Order Serial No. 4793) denies the application of such carrier to service Curacao, N. W. I., on its Miami-Caracas route and to serve Havana, Cuba, on its Miami-Kingston-Balboa and Miami-Kingston-Barranquilla routes.

3. The other matters set forth in the aforesaid petitions and requests for reconsideration relate to matters duly considered by the Board in its opinion and orders of May 17, 1946, and do not constitute sufficient grounds

to justify rehearing, reargument or reconsideration as to said opinion and orders,

It Is Ordered:

1. That the above-entitled proceeding be reopened for the purpose of further argument before the Board and for reconsideration by the Board of the order of May 17, 1946 (Order Serial No. 4793), herein with respect to (a) the denial of the applications of Colonial Airlines, Inc., Eastern Air Lines, Inc., and National Airlines, Inc., insofar as they propose through service between Balboa, C. Z., one or more of the intermediate points Barranquilla, Colombia, Kingston, Jamaica, Havana, Cuba, and cities in the eastern part of the United States; and (b) the denial of the applications of Pan American Airways, Inc., insofar as they propose service at Curacao, N. W. I., on its Miami-Caracas route and at Havana, Cuba, on its Miami-Kingston-Balboa and Miami-Kingston-Barranquilla routes.

2. That the aforesaid petitions and requests in all other respects be and they hereby are denied.

By the Civil Aeronautics Board:

(Sgd.) FRED A. TOOMBS,
(Seal) (Fred A. Toombs)
Secretary.

11765

CERTIFIED COPY OF RULES OF PROCEDURE OF CIVIL AERONAUTICS BOARD.

261 Filed November 4, 1946.

Form CAB 37
(Rev. 11-1-40)

Civil Aeronautics Board.

Certification of True Copy.

Washington, October 11, 1946.

I Hereby Certify that the annexed is a true copy of the original Rules of Practice under Title IV and Section 1002(d) to (i) of the Civil Aeronautics Act of 1938, as amended, Part 285 of the Economic Regulations of the Civil Aeronautics Board, as amended to April 24, 1946 and in effect until September 11, 1946 on file in the official records of the Civil Aeronautics Board in Washington, D. C.

ELISE McGAUGHEY,
Acting Chief, Minutes Section.
(Official title)

Office of the Secretary of the Board.

I Hereby Certify that Elise McGaughey who signed the foregoing certificate, is now, and was at the time of signing, Acting Chief, Minutes Section and that full faith and credit should be given her certificate as such.

In Witness Whereof, I have hereunto subscribed my name, and caused the seal of the Civil Aeronautics Board

to be affixed this eleventh day of October, one thousand nine hundred and forty-six.

M. C. MULLISAN,
Secretary, Civil Aeronautics Board.

(Seal)

Civil Aeronautics Board,
Washington 25, D. C.

Part 285[1]

Rules of Practice Under Title IV and Section 1002(d) to (i) of the Civil Aeronautics Act of 1938, as Amended.

[1] As amended to April 24, 1944. The Rules of Practice (Part 285 of the Economic Regulations of the Board) as set forth herein consist of Regulation Serial No. 257 adopted Feb. 17, 1943; as amended by Regulation Serial No. 285 adopted Aug. 25, 1943, and as further amended by Regulation Serial No. 303 adopted March 8, 1944.

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Section 285.1. Proceedings.

There shall be one form of formal proceeding (to be known as a "proceeding") under Title IV and section 1002(d)-(i) of the Act.

A proceeding may be instituted (1) by order to show cause or other process of the Board, (2) by the filing with the Board of a formal application, complaint or petition.

Section 285.2. General Requirements as to Papers in Proceedings.

(a) *Informal Complaints.* Complaints may be made to the Board informally by letter or other writing and matters so presented may, if their nature warrants, be taken up by correspondence or conference with the person or persons complained of. Any matter not disposed of informally may be made the subject of a formal proceeding.

(b) *Conformity to Rules.* Any person wishing to institute a proceeding should consult the rules, regulations and orders of the Board under the various sections of the Act.

(c) *Requirements in Absence of Rules.* In case there is no rule, regulation or order of the Board which prescribes the contents of the formal application, complaint or petition in a given case, the application, complaint or petition should contain a concise but complete statement of the facts relied upon as the basis for the relief sought. The names and addresses of the persons, if any, against whom relief is sought, should also be set forth in full.

(d) *Insufficient Allegations.* In any case where the Board is of the opinion that a formal application, complaint or petition does not sufficiently set forth the material required to be set forth by any applicable rule, regulation or order of the Board, or is otherwise insufficient, the Board may advise the party filing the same of the deficiency and require that any additional information be supplied by amendment.

(e) *Answers.* Answers to formal complaints, petitions and orders to show cause will not usually be required. In case the Board deems an answer to be desirable, the parties will be notified.

(f) *Retention of Papers by the Board.* When any formal application, complaint or petition is denied, dismissed or permitted to be withdrawn, in whole or in part, said application, complaint or petition, and all documents filed with the Board pertaining thereto shall be retained in the files of the Board. When any proceeding instituted by the Board is dismissed, terminated or rescinded, all documents filed with the Board pertaining

thereto shall be retained in the files of the Board; *Provided*, that this paragraph shall not apply to documents filed with the Board in any proceeding on the basis of a stipulation that such documents will be returned to the parties so filing when the purpose for which the documents are filed has been served.

Section 285.3. Form and Filing of Documents.

(a) *Execution, Number of Copies, and Service.* Unless otherwise required by applicable rule or regulation, every application, petition and formal complaint relating to any of the provisions of Title IV or of section 1002(d)-(i) of the Act, and every answer or other formal document in any such proceeding, shall be signed by, or on behalf of, the person filing the same, and shall be verified by the person signing the same, in the manner required by subsection (b) of this section. Briefs and exceptions to reports of examiners shall be signed but need not be verified. Any general partner may sign on behalf of a partnership. Documents filed by a corporation, business trust or other similar organization must be signed by an officer who is duly authorized to take such action. An executed original copy of each such document, and nineteen true copies thereof, which need not be signed or verified, but which should have typed or facsimilie signatures, shall be filed with the Board. Each person filing any such document shall furnish such additional copies and shall make such service of the document on other persons as the Board may at any time require. Such documents shall be delivered in person, through the mails, or otherwise, to the Civil Aeronautics Board in Washington, D. C., and shall be deemed to have been filed on the date on which they are actually received by the Board.

(b). *Verification.* Every verification shall set forth that the person verifying the document has read and is familiar with the contents thereof and the attached exhibits, if any; that he intends and desires that in granting or denying the relief requested, the Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts therein set forth; that to the best of his information and belief, every statement contained in the instrument is true and no such statement is misleading.

(c) *Formal Specifications of Papers.* All papers filed in proceedings should be on strong, durable paper not larger than 8½" by 13" in size except that tables, charts and other documents may be larger, folded to approximately that size. The left margin should be at least 1½" wide and, if the document is bound, it should be bound on the left side.

Papers may be reproduced by printing or by any other process, provided the copies are clear and legible. Appropriate notes or other indications should be used, so that the existence of deficits and any other matters normally shown in color will be accurately indicated on photostatic copies.

(d) *Waiver of Strict Compliance with Rule.* The Board may, in its discretion, waive strict compliance with any requirement of this section.

Section 285.4. Appearances by Third Persons and Formal Interventions.

(a) *Appearances.* Any person, including any state, political subdivision thereof, state aviation commission, or other public body, may appear at any hearing and

present any evidence which is relevant to the issues. Such persons may also suggest questions or interrogatories to be propounded by public counsel to witnesses called by other persons. With the consent of the examiner, or of the Board, if the hearing is held before the Board, such persons may also cross-examine witnesses directly.

(b) *Formal Interventions.* Any person having a substantial interest in the subject matter of any proceeding may petition for leave to intervene in such proceeding and may become a party thereto upon compliance with the provisions of this paragraph. In general, such petitions will not be granted unless the Board, or, in appropriate cases the examiner, shall find,

(1) that such person has a statutory right to be made a party to such proceeding; or,

(2) That such person will or may be bound by the order to be entered in the proceeding; or,

(3) that such person has a property or financial interest which may not be adequately represented by existing parties, if such intervention would not unduly broaden the issues or delay the proceeding.

However, the denial of such a petition for leave to intervene shall not prevent the petitioner from participating in the proceeding in the manner described in paragraph (a) of this section.

Unless otherwise ordered by the Board, every petition for leave to intervene shall be filed with the Board not later than 10 days prior to the hearing, or in the event that a prehearing conference is to be held pursuant to

section 285.10 of the Economic Regulations, such petition shall be filed prior to the first such conference. Copies of the petition shall be mailed or delivered to each party to the proceeding prior to the filing of the petition. The Board, however, may pass upon any such petition without receiving testimony or argument either from the petitioner or from other parties to the proceeding. The petition shall clearly set forth the interest of the petitioner, and shall otherwise comply with the requirements of section 285.3 of the Economic Regulations.

No petition for leave to intervene, not filed within the time limited by the preceding paragraph of this subsection, will be entertained by the Board or the examiner unless the petitioner shall clearly show good cause for his failure to file such petition with the time so limited. In the event that such petition is heard by an examiner, his determination shall be governed by the standards hereinabove set forth, but no decision by an examiner on such petition shall be binding on the Board. Interventions herein provided are for administrative purposes, and no decision to grant leave to intervene shall be deemed to constitute a finding or determination that the intervening party has such a substantial interest in the order that is to be entered in that proceeding as will entitle it to demand Court review of such order.

Section 285.5. Hearings, Argument, Examiner's Report, and Proceedings Subsequent Thereto.

(a) *Oral Argument Before Examiner, Proposed Findings, Briefs.* Upon request of any party, an examiner may permit oral argument at the close of the hearing. Oral argument shall be transcribed, but shall not constitute part of the record.

If a case presents unusually difficult questions of fact or law, the examiner may permit or require the submission of proposed findings of fact or conclusions of law, or of written briefs, to aid him in the preparation of his report.

(b) *Examiner's Report.* In each case heard before an examiner, an appropriate announcement will be made by the examiner prior to the close of the hearing as to whether or not an examiner's report will be made in the proceeding. Such report will ordinarily be made, except in cases where the examiner, with the consent of Public Counsel, and without objection by any other party, announces at the hearing that he will recommend the granting of the application or other relief under consideration in the proceeding. If an examiner's report is to be made in the proceeding, the examiner will also announce, or state in his report,

(1) the names of the persons who are to receive copies of the same;

(2) the time within which exceptions are to be filed and exchanged; and

(3) the time thereafter within which briefs relating to such exceptions are to be filed and exchanged,

and may give other instructions relating to procedure after the hearing.

After a date has been set for the submission of proposed findings of fact or conclusions of law, or written briefs to the examiner, or the filing of exceptions to examiner's report or briefs thereon, such date may be postponed upon proper cause shown, but any such postpone-

ment shall not be granted by the examiner less than three days prior to the date originally set for the filing thereof except in cases involving unusual circumstances imposing substantial hardship upon the requesting party or parties.

(c) *Exceptions and Briefs; Service Thereof.* Any party to the proceeding may take exceptions either to the examiner's recommended findings of fact or conclusions of law. Exceptions to findings of fact shall designate, by exact and specific reference, the portions of the record which will be relied upon in support of such exceptions. Exceptions to conclusions of law shall briefly cite the statutory provisions or the principal authorities that will be relied upon in support of the exceptions to the conclusions of law.

After the filing and exchange of exceptions, each party should prepare a single brief supporting its own exceptions and covering any points which it wishes to raise in connection with exceptions filed by others. Except by special permission of the Board, briefs shall not exceed 50 pages in length. Reply briefs will not be received except by special permission of the Board. Exceptions and briefs shall be filed with the Board and not with the examiner.

Each set of exceptions and brief shall, when filed, be accompanied by a proof of service thereof by mail upon all parties to the proceedings and upon such other persons designated by the examiner to receive copies of the report. The number of copies to be filed is governed by subsection (a) of Section 285.3.

(d) *Oral Argument Before the Board.* If any person desires to argue a case orally before the Board he must

request leave of the Board to make such argument. Such request should be filed with the briefs for the Board in the proceeding. The Board will advise the persons making such request as to its decision and if such argument is to be allowed all persons who have filed briefs in the proceedings will be advised of the date and hour set for such argument and the amount of time allowed to each such person.

Section 285.6. Exhibits.

Wherever practicable, one copy of each exhibit (in addition to the original offered in evidence at the hearing) should be furnished to Public Counsel. One of such copies will be made available for inspection by all persons present at the hearing. One copy should also be furnished to each party and the examiner may, in his discretion, direct that any other person deemed by him to have a sufficient interest shall receive copies of designated exhibits.

Excerpts from lengthy documents or of portions of the record in other proceedings before the Board should be offered in the form of exhibits and copies furnished as above provided. Such exhibits may be received in evidence, subject to objection and rebuttal by Public Counsel or other counsel, after opportunity to examine the exhibit in question and the source from which the same was taken.

Section 285.7. Hearings Before the Board and Before Boards of Examiners.

Provisions of this Part governing the conduct of hearings before single examiners shall also govern, with necessary changes, in cases where such hearings are held

before the Board, a member thereof, or a Board of more than one examiner.

Section 285.8. Petition for Rehearing, Reargument, or Reconsideration.

Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.

The matters of record claimed to have been erroneously decided must be specified, and the alleged errors, and the grounds relied upon must be briefly and specifically stated in the petition.

If a final order of the Board is sought to be vacated or modified by reason of matters which have arisen since the hearing, or of a consequence which would result from a compliance therewith, or both, the new matter, the resulting consequence, or both, which are relied upon by the petitioner must each be set forth in the petition. Where the petition is based wholly or in part upon new matter, the petition must contain a statement that the petitioner, with due diligence, could not have known or discovered the new matter prior to the time of the hearing.

The petition must set forth a brief statement of the relief sought by the petitioner.

Such petition for rehearing, reargument, or reconsideration, must be filed within thirty days after service of the order sought to be vacated or modified. After the expiration of said thirty days, such a petition may be filed only by leave of the Board granted pursuant to

formal application upon a showing of reasonable grounds for failure to file the petition within the prescribed thirty-day period. Any such petition or application shall be served by the petition or applicant upon all parties to the proceeding or their attorneys of record.

No petition for rehearing, reargument, or reconsideration filed in accordance with this section, or the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specifically so ordered by the Board.

Petitions under this section must conform to the requirements of Section 285.3.

Section 285.9. Memoranda in Opposition or Support.

Each protest or memorandum of opposition to or in support of the issuance, alteration, amendment, modification, suspension, revocation or abandonment of a certificate of public convenience and necessity or of a foreign air carrier permit which is desired to be filed with the Board pursuant to the provisions of section 401 or 402 of the Act, shall conform to the requirements of Section 285.3 with respect to size, style and number of copies, shall be signed by the person filing it, and shall be acknowledged before a person authorized to administer oaths. Each such protest or memorandum shall clearly state on its face the particular proceeding in which it is desired to be filed and shall contain a concise but clear statement of the grounds of opposition or support. At the time of filing any such memorandum with the Board, the person filing it shall serve a copy thereof upon each party to the particular proceeding and upon such other persons as the Board may require. No such protest or memorandum will be received as, or be considered to

constitute, evidence in the particular proceeding of any fact mentioned or discussed therein. However, evidence in support of any such protest or memorandum may be presented by or on behalf of the person filing it in the manner provided in subsection (a) Section 285.4.

Section 285.10. Conference Procedure.

In any proceeding, the examiner designated to conduct the hearing, or any other person designated by the Chief Examiner or by the Board for the purpose of this rule, may direct counsel for the parties to such proceeding to appear before him for a conference to consider the following:

(a) The formulation of the issues to be considered at the hearing by:

(1) Agreement of the parties,

(2) Amendment of the application, complaint, or petition,

(3) Any other appropriate means;

(b) The simplification of proof by:

(1) Stipulations concerning matters of which the Board can take notice, the admission in evidence of particular facts or documents, or any other appropriate matter,

(2) Limitation of the number of witnesses,

(3) The preparation of exhibits, and the use thereof in lieu of oral testimony whenever possible.

(4) Any other appropriate means;

(c) The exchange prior to the date of the hearing of exhibits proposed to be introduced therein and any other material which will expedite the conduct of the same;

(d) Such other matters as may, in the opinion of the person conducting the conference, aid in the conduct and disposition of the proceeding.

Notice of the time and place of the conference shall be given by letter or otherwise to all parties to the proceeding.

The person conducting the conference may require the exchange of particular exhibits in advance of the date set for the hearing, and if any exhibits are not exchanged in advance as required, or as agreed upon by counsel at the conference, the hearing shall be subject to postponement until such exchange is completed.

The person conducting the conference shall prepare a report of the same, which shall be served upon counsel for all of the parties and made of record. Counsel may object to the description of anything which occurred at the conference within five days after the receipt of the report, and such report may, in the discretion of the person preparing the same, be revised in accordance therewith. If revised, the report shall again be served upon counsel and made of record in the same manner as the original report. Exceptions may be taken on the basis of any written objection submitted within the time prescribed which has not been met by a revision of the report. Such report shall constitute the official account of all that transpired at the conference, and shall control the subsequent course of the proceeding, but it may

be reconsidered and modified at any time to prevent injustice.

Section 285.11. Procedure in Mail Rate Proceedings.

(a) *Institution of Proceedings.* Proceedings for the determination of rates of compensation for the transportation of mail may be commenced by the filing of a petition by an air carrier or the Postmaster General, or upon the issuance of an order by the Board.

(b) *Order Setting Tentative Rate.* Proceedings commenced by the Board will normally be instituted by the issuance of an order directing the parties to show cause why a specified rate or rates set out in such order should not be fixed and determined by the Board.

(2) In proceedings instituted upon petition of a carrier or the Postmaster General the Board, before proceeding further with the disposition of the petition, will normally issue an order in the proceeding directing the parties to show cause why a specified rate or rates set out in such order should not be fixed and determined by the Board.

(3) The rate or rates specified in any order provided for in subsections (b)(1) and (b)(2) of this section will represent a tentative rate or rates which appear to the Board to be fair and reasonable on the basis of the monthly and annual reports made by the carrier to the Board, and other information available to the Board. Such order will be accompanied by an exhibit or exhibits setting forth the basis upon which the tentative rates or rates have been formulated, and such exhibits shall be a part of such order.

(4) Orders issued hereunder will be served upon the carrier concerned, and any other parties to the proceeding, and public notice thereof will be given. Copies of such orders will be transmitted to the Postmaster General.

(c) *Objection and Answer to Order Setting Tentative Rate.*

(1) After the issuance of an order of the Board pursuant to subsection (b) of this section, any party having objections to the tentative rate or rates specified in such order or the admissibility in evidence of the exhibits accompanying such order and information specified therein shall file with the Board, within such period of time as may be prescribed in such order:

a. Notice of the fact that such objections exist; and

b. After the notice provided for in cluase "a" of this subsection has been filed, as written answer setting out the objections of the party to the tentative rate or rates.

(2) The objections stated in the answer shall be specific, and the answer shall be accompanied by exhibits in support of the objections and by a statement of the effect of such objections upon the tentative rate or rates.

(d) *Procedure When No Answer is Filed to Order Setting Tentative Rate.* (1) If no notice, or if after notice no answer is filed as provided in subsection (c) of this section within the periods of time prescribed in the order, the proceeding will be assigned for public hearing. The statutory public hearing thus assigned will be expected to require nothing more than the introduction in evidence of the exhibits provided for in subsection (b) (3) of this section and the information specified therein.

(2) The Board, upon the close of such hearing, will make the tentative rate or rates specified in its order pursuant to subsection (b) of this section final by the issuance of its further order.

(e) *Procedure When Answer is Filed to Order Setting Tentative Rate.* (1) If an answer is filed as provided in subsection (c) of this section a conference will be held. The conference will be attended by represenatives of the Board assigned to the particular case and representatives of the parties, and will be presided over by an examiner of the Board.

(2) If a party desires to introduce evidence in the proceeding, he shall file written notice with the examiner at the time of such conference; if a party desires an opportunity to file briefs with, or present oral argument to, the Board, he shall file a written request therefor with the examiner not later than the close of the hearing hereinafter provided for.

(3) The examiner, at the close of the conference, will prepare and serve upon the parties a report stating the issues raised by the objections of the parties with respect to the tentative rate or rates. Any party may file exceptions to such report.

(4) After service of the report provided for in subsection (e)(3) of this section, the proceeding will be assigned for public hearing before an examiner of the Board.

(5) The exhibits provided for in subsection (b)(3) of this section and the information specified therein, and any exhibits filed by any party in support of any objections filed pursuant to subsection (c) of this section shall

constitute evidence of record in the proceeding, subject to the right of any party to object to the admissibility of such exhibits and information. Additional evidence may be presented by the parties at such hearing only if the notice provided for in subsection (e)(2) has been filed, and such evidence shall be limited to evidence relating to the issues as defined in the conference report issued by the examiner and exceptions filed thereto pursuant to subsection (e)(3). A member (or members of the Board's staff will be available at the hearing for examination by the parties on the evidence with respect to such issues.

(6) The proceeding will be deemed submitted to the Board for final decision, without the issuance of an examiner's report, upon the close of the hearing, the filing of briefs, or the presentation of oral argument, as may be in order pursuant to requests made in accordance with the provisions of subsection (e)(2) of this section.

Section 285.12. Objection to Public Disclosure of Information.

(a) *Information Contained in Paper to be Filed.* Any person who objects to the public disclosure of any information contained in any paper filed in any proceeding, or in any application, report, or other document filed pursuant to the provisions of the Civil Aeronautics Act of 1938, as amended, or any rule, regulation, or order of the Board thereunder, shall segregate, or request the segregation of, such information into a separate paper and shall file it, or request that it be filed, with the examiner or the person conducting the hearing or proceeding, as the case may be, or with the person with whom said application, report, or document is required to be filed, separately in a sealed envelope, being the caption of the

enclosed paper and the notation "Confidential Information". At the time of filing such paper, or, when the objection is made by a person not himself filing the paper, application, report, or other document, within five days after the filing of such paper, the objecting party shall file a motion to withhold the information from public disclosure, in accordance with the procedure outlined in subsection (d) of this section, except as hereinafter provided in subsection (c). Notwithstanding any other provision of this section, copies of the filed paper and of the motion need not be served upon any other party unless so ordered by the Board.

(b) *Information Contained in Oral Testimony.* Any person who objects to the public disclosure of any information sought to be elicited from a witness or deponent on oral examination shall, before such information is disclosed, make his objection known. Upon such objection duly made, the witness or deponent shall be compelled to disclose such information only in the presence of the examiner or the person before whom the deposition is being taken, as the case may be, the official stenographer and such attorneys for and lay representatives of each party as the examiner or person before whom the deposition is being taken, as the case may be, shall designate, and after all present have been sworn to secrecy. The transcript of testimony containing such information shall be segregated and filed in a sealed envelope, bearing the title and docket number of the proceeding, and the notation "Confidential Testimony Given by (name of witness or deponent)." Within five days after such testimony is given the objecting person shall file a motion, except as hereinafter provided in subsection (c), in accordance with the procedure outlined in subsection (d) of this section, to withhold the information from public disclosure. Notwithstanding any

other provision of this section, copies of the segregated portion of the transcript and of the motion need not be served upon any other party unless so ordered by the Board.

(c) *Objection by Governmental Departments or Representatives Thereof.* In the case of objection to the public disclosure of any information filed by or elicited from any governmental department, or representative thereof, under subsections (a) or (b) of this section, the department, or person representing said department, making such objection shall be exempted from the provisions of subsections (a), (b), and (d) hereof in so far as said subsections require the filing of a written objection to such disclosure. However, any department, or person representing said department, if it so desires, may file a memorandum setting for the reason on the basis of which it is claimed that a public disclosure of the information should not be made. If such a memorandum is submitted, it shall be filed and handled as is provided by this section in the case of a motion to withhold information from public disclosure.

(d) *Form of Motion to Withhold Information from Public Disclosure.* Subject to the exception of subsection (c), no information covered by subsections (a) and (b) of this section need be withheld from public disclosure unless written objection to such disclosure is filed with the Board in accordance with the following procedure:

(1) The motion shall be headed with the title and docket number of the proceeding and shall be signed and verified by the objecting person, any duly authorized officer or agent thereof, or by counsel representing such person in the proceeding.

(2) The motion shall include (i) a description of the information sought to be withheld, sufficient for identification of the same, and (ii) a full statement of the reasons on the basis of which it is claimed that a public disclosure of the information would adversely affect the interests of the objecting person and is not required in the interest of the public, or that the information is of a secret nature affecting the national defense.

(3) Such motion shall be filed with the examiner or the person conducting the hearing or proceeding, as the case may be, or with the person with whom said application, report, or document is required to be filed.

If such motion relates to contracts, agreements, understandings, or arrangements filed pursuant to section 412(a) of the Civil Aeronautics Act of 1938, as amended, and Section 251.1 of the Economic Regulations, or pursuant to Section 251.2 of the Economic Regulations, an executed original copy and two copies of such motion shall be filed.

(e) *Motion Referred to the Board.* The order of the Board containing its ruling upon each such motion will specify the extent to which, and the conditions upon which, the information may be disclosed to the parties and to the public, unless, within five days after the date of the entry of the Board's order with respect thereto, a petition is filed by the objecting person requesting reconsideration by the Board, or a written and verified statement is filed indicating that the objecting person in good faith intends to seek judicial review of the Board's order.

(f) *Objection in Proceeding Before the Board.* Notwithstanding any of the provisions of this section, when-

ever the objection to disclosure of information shall have been made, in the first instance, before the Board itself, the written motion of objection contemplated by subsections (a), (b), and (d) of this section shall not be necessary, but may be submitted if the parties so desire or if the Board, in a particular case, shall so direct.

(Seal)

MOTION OF CHICAGO & SOUTHERN AIR LINES, INC., FOR LEAVE TO INTERVENE.

Filed October 30, 1946.

U. S. Circuit Court of Appeals. Filed Oct. 30, 1946. Oakley F. Dodd, Clerk.

United States Circuit Court of Appeals for the Fifth Circuit.

275 Waterman Steamship Corporation.
vs. No. 11765.
Civil Aeronautics Board.

NOTICE OF MOTION FOR LEAVE TO INTERVENE.

To:

Francis H. Inge, Esquire,
Attorney for Petitioner,
403 Merchants National Bank Building,
Mobile 6, Alabama.

Bon Geaslin, Esquire,
Sterling F. Stoudenmire, Jr., Esquire,
Joseph M. Paul, Esquire,
Of Counsel for Petitioner,
520 Investment Building,
Washington, D. C.

Edward J. Hickey, Jr., Esquire,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

H. Don Reynolds, Esquire,
Chief, Enforcement & Litigation Section,
Civil Aeronautics Board,
Commerce Building,
Washington, D. C.
Attorneys for Respondent, Civil Aeronautics Board.

Please take notice that Chicago and Southern Air Lines, Inc., will, on the 8th day of November, 1946, at 10:00 A. M., or as soon thereafter as counsel can be heard, present to the United States Circuit Court of Appeals for the Fifth Circuit, at Fort Worth, Texas, its motion for leave to intervene, a copy of which motion is hereto attached, and then and there move that said Court enter an order permitting Chicago and Southern Air Lines, Inc., to intervene as a party respondent in the captioned proceeding, as prayed for in said motion, and for such other relief as equity, law and the nature of the case may require.

Dated this 30th day of October, 1946.

(Signed) R. EMMETT KERRIGAN,
(R. Emmett Kerrigan)
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Chicago and Southern Air Lines, Inc.

R. S. MAURER,
J. M. VERNER,
MARIAN MAYER,
Of Counsel.

United States Circuit Court of Appeals for the Fifth Circuit.

276 Waterman Steamship Corporation
vs. No. 11,765.
Civil Aeronautics Board.

MOTION OF CHICAGO AND SOUTHERN AIR LINES, INC. FOR LEAVE TO INTERVENE.

To the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now Chicago and Southern Air Lines, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Municipal Air-

port, Memphis, Tennessee, herein sometimes referred to as C. & S., and respectfully shows that:

I.

As will appear from its petition herein, Waterman Steamship Corporation complains of the issuance of a Certificate of Public Convenience and Necessity to C. & S. instead of to Waterman Steamship Corporation, and Waterman Steamship Corporation is endeavoring in this proceeding to have said certificate set aside and annulled.

II.

C. & S. desires leave of the Court to intervene herein specially for the purpose of filing a motion to dismiss this proceeding on the ground that C. & S. is an indispensable party to this proceeding and has not been joined as a party or given notice of the proceeding by Waterman Steamship Corporation, petitioner.

III.

In the alternative and with full reservation of all of its rights under such a special appearance, as set forth in the preceding paragraph herein, C. & S. desires leave of this Court to intervene herein and be made a party hereto for the purpose of moving the dismissal of this proceeding on other grounds and for the purpose of opposing the petition filed herein by Waterman Steamship Corporation, petitioner.

Wherefore, Chicago and Southern Air Lines, Inc., prays that it may be granted leave to intervene herein specially for the limited purpose of presenting and filing a motion

to dismiss this proceeding on the ground that C. & S. is an indispensable party hereto and has not been joined or given notice thereof by petitioner, and that, without prejudice to its rights under such a motion, C. & S. be granted further leave to intervene herein to move the dismissal of this proceeding on other grounds, and to oppose the petition filed herein by Waterman Steamship Corporation; and for such other relief as equity, law and the nature of the case may require.

(Signed) R. EMMETT KERRIGAN,
(R. Emmett Kerrigan)
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Chicago and Southern Air Lines, Inc.

R. S. MAURER,
J. M. VERNER,
MARIAN MAYER,
Of Counsel.

277 ORDER.

It is hereby ordered that Chicago and Southern Air Lines, Inc., is granted leave to intervene in this proceeding as prayed for in the foregoing motion.

Nov. 8th, 1946.

(Signed) J. C. HUTCHESON, JR.,
U. S. Circuit Judge.

278 CERTIFICATE OF SERVICE.

I hereby certify that I have this day served a copy of the foregoing notice and motion for leave to intervene on petitioner and respondent herein by mailing a copy thereof, postage prepaid, to:

Francis H. Inge, Esquire,
Attorney for Petitioner,
403 Merchants National Bank Building,
Mobile 6, Alabama.

Bon Geaslin, Esquire,
Sterling F. Stoudenmire, Jr., Esquire,
Joseph M. Paul, Esquire,
Of Counsel for Petitioner,
520 Investment Building,
Washington, D. C.

Edward J. Hickey, Jr., Esquire,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

H. Don Reynolds, Esquire,
Chief, Enforcement & Litigation Section,
Civil Aeronautics Board,
Commerce Building,
Washington, D. C.
Attorneys for Respondent, Civil Aeronautics Board.

Dated this 30th day of October, 1946.

(Signed) R. EMMETT KERRIGAN,
(R. Emmett Kerrigan)
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Chicago and Southern Air Lines, Inc.

ORDER GRANTING LEAVE TO CHICAGO & SOUTHERN AIR LINES, INC., TO INTERVENE.

279 Extract from the Minutes of November 8, 1946.

Waterman Steamship Corporation,
vs. No. 11765.
Civil Aeronautics Board.

It is hereby ordered that Chicago and Southern Air Lines, Inc., be granted leave to intervene in the proceeding as prayed for in the foregoing motion.

(Signed) J. C. HUTCHESON, JR.,
U. S. Circuit Judge.

Nov. 8th, 1946.

ANSWER OF PETITIONER TO MOTION OF RESPONDENT TO WITHHOLD CERTIFICATION OF RECORD.

280 Filed November 22, 1946.

In the United States Circuit Court of Appeals for the Fifth Circuit.

Waterman Steamship Corporation, Petitioner,
v. No. 11765.
Civil Aeronautics Board, Respondent.

ANSWER OF PETITIONER TO MOTION OF RESPONDENT TO WITHHOLD CERTIFICATION AND FILING OF RECORD.

To the Honorable, the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Petitioner, Waterman Steamship Corporation, and files this its answer to the motion of Re-

spondent to withhold certification and filing of record, filed herein on or about the first day of November, 1946 and in support hereof resectfully represents to this Honorable Court as follows:

I.

The petition for review of certain orders of the Respondent Civil Aeronautics Board [1] was filed on September 5, 1946, pursuant to Section 1006 (a) of the Civil Aeronautics Act of 1938, as amended, (49 U. S. C. Sec. 646).

Under Section 1006 (c) of the Act it thereupon became the duty of the Board to "certify and file in the Court a transcript of the record, if any, upon which the order complained of was entered". The Respondent Board now seeks relief from this provision of law by its motion to withhold certification and filing of record. The motion of Respondent Board is in furtherance of its "Motion to Dismiss the Petition for Review, or in the Alternative, to Affirm Respondent's Orders" filed on or about October 22, 1946. It appears from the two motions that the Board desires only limited review of the orders appealed from herein. It is the contention of the respondent that this Honorable Court lacks jurisdiction to review the orders and opinion on which review is sought because, *inter alia*, of the provisions of Section 801 (49 U. S. C. Sec. 601) of the Act, in accordance with which provisions, the President of the United States has approved one of the orders and the opinion of the Board sought to be reviewed.

[1] Prior to July 1, 1940 the Board was known as the Civil Aeronautics Authority. It is so referred to in the Civil Aeronautics Act of 1938. (49 U. S. C. Sec. 401 et seq.). The change of name was made by the President's Reorganization Plan No. IV, 5 Fed. Reg. 2421-2422.

II.

There is no sanction in the Civil Aeronautics Act of 1938 or the Rules of this Honorable Court for a limited review of the orders and opinion of the Board complained of. Section 1006 (a) (49 U. S. C. Sec. 646) of the Act provides for a full and complete review of the orders and opinion complained of. Without attempting to discuss this matter fully at this time, it is believed sufficient for the purposes of this answer to point out that it would not be possible for this Court to pass on this Petition for Review without an examination of the entire record.

The provisions of Section 1006 (a) (49 U. S. C. Sec. 646) of the Act are clear and specific that any order of the Board, except an order in respect of any *foreign air carrier* subject to the approval of the President, shall be subject to review by the Courts. The term "foreign air carrier" is defined as any person, not a citizen of the United States, who undertakes to engage in foreign air transportation. The order of the Respondent for which a review is sought do not involve a foreign air carrier. The plain language of the statute may not, therefore, be set aside or disregarded by this Court, as suggested by the Respondent.

III.

As disclosed by the Petition for Review herein, the orders sougnt to be reviewed are not the orders of the President. The statute does not confer upon the President authority to make any orders or issue certificates of public convenience and necessity under the Act. The President's only function is to approve or refuse to approve the issuance or denial, etc. of any certificate authorizing an air carrier to engage in overseas or for-

eign transportation or any permit issuable to any foreign air carrier under Section 402 of the Act. (Sec. 801, *supra.*)

Therefore, with the exception of orders involving foreign air carriers, all questions of the jurisdiction of the Board and its statutory authority to issue any order, and particularly the orders complained of, are open to examination by the Courts.

If, as contended by the Petitioner, the orders and opinion of the Board were erroneous as a matter of law, and the findings of fact upon which they are based are not supported by substantial evidence, or are contrary to the facts of record, the Board had no jurisdiction to make the orders complained of, and the President had before him no lawful order of the Board upon which he could act. The approval by the President of an order of the Board, which it had no authority to issue, and which is void *ab initio*, cannot give such order any legal effect. It follows that the legality of the orders of the Board, although approved by the President, is subject to judicial review. *Carl Zeiss, Inc. v. United States*, 76 F. (2d) 412 (C. C. P. A., 1935); *David L. Moss Co., Inc. v. United States*, 103 F. (2d) 395 (C. C. P. A. 1939). Therefore, the issues presented by this Petition cannot be determined without a full review by this Court of the entire record before the Board on this matter.

IV.

The provisions for judicial review of the Board's orders are in accord with the well-established principle of affording protection to applicants against the arbitrary or unauthorized acts of the Board. Moreover, since the issuance of a certificate of public convenience and necessity

to an air carrier usually results in the payment of large sums from the public treasury in the form of compensation for the transportation of mail, the provisions for review afforded a judicial restraint upon the obtaining of such certificates by misrepresentation and fraud. These elements are not present with respect to applications for permits by foreign air carriers.

V.

The Petition for Review alleges as one of the grounds thereof that the Respondent did not have substantial evidence, or any evidence at all before it, to support its finding, if any it made, that Chicago & Southern Air Lines, Inc., to which a certificate was issued, was fit, willing and able to perform properly the transportation authorized in said certificate.

Without undertaking here a discussion of the entire record, Petitioner invites the Court's attention to certain exhibits, testimony and other matters of which the Court may take judicial notice, which demonstrate the necessity of a certification of the whole record.

Exhibit C & S No. 30, Revised, page 1, introduced in evidence by Chicago & Southern Air Lines, Inc., at the hearing before the Board in Docket No. 525, et al., purports to show the "estimate Of The Annual Operating Statistics, Revenue (Except Mail Revenues) And Additional Expenses Anticipated By The Applicant In The Operation Of The Proposed Routes". A copy of that Exhibit is attached hereto and marked Petitioner's Exhibit No. 1. It discloses that Chicago & Southern Air Lines, Inc., represented to the board on the route New Orleans to San Juan, via Havana, it estimated it would carry an average of twenty passengers per mile. The revenue

therefrom, together with the revenues from express and excess baggage would result, according to the exhibit, in operating revenues, except mail revenues, estimated at 151.90 cents per mile. The exhibit shows the cost of operation over said route upon an additional expense basis was estimated to be 117.92 cents per mile. This, according to the exhibit, would result in an estimated annual profit, before mail pay, of $435,940.00.

VI.

There is attached hereto and marked Petitioner's Exhibit No. 2, an excerpt from the testimony of Mr. Carlton Putnam, President of Chicago & Southern Air Lines, Inc., in Consolidated Proceeding Docket No. 525, et al., on September 29, 1944. That is the same proceeding which resulted in the orders Petitioner seeks to have reviewed. In that testimony, the witness testified that in view of the estimated profits shown in the company's exhibits, the company would be willing to undertake the operation with mail pay at the rate it was then receiving on its domestic services, which amounted to sixty cents per ton mile.

The Board in its opinion, a review of which is sought herein, with obvious reference to the possible cost to the government in the form of compensation for the transportation of mail, said: (Opinion of Board, Doc. 525, p. 58)

"Although it is not likely that the New Orleans-San Juan service will require any substantial subsidy payment especially if it is conducted as a part of an independent airline system, the considerations advanced by Waterman would carry substantial weight if Waterman alone were an applicant."

VII.

After the issuance of the Certificate on May 17, 1946, to-wit: on June 10, 1946, Chicago and Southern Air Lines, Inc., filed with the Securities and Exchange Commission a prospectus which was later distributed to the public relating to the sale of 170,000 shares common stock voting trust certificates. In this prospectus, of which the Court may take judicial notice, the following statement appeared: (P. 8)

"The almost three-fold increase in the Company's route mileage created by this recent award is deemed by the management to be in the best interest of the Company. The Company, however, can make no prediction either with *respect to the time within which operations will commence along these new Caribbean routes* or with respect to the time when operation over such routes will be profitable." (Emphasis supplied.)

VIII.

In further answer to the Respondent's motion to withhold certification and filing of record herein, petitioner avers that Chicago & Southern Air Lines, Inc., represented to the Respondent in its Docket No. 525, et al., in support of its application for a certificate of public convenience and necessity that it would provide through-plane service on the New Orleans, Havanah, San Juan route.

Petitioner avers that it is obvious from the Board's opinion, which it is sought to have reviewed in this proceeding, that these representations had great weight with the Board in its determination to issue the certificate to Chicago & Southern Air Lines, Inc. The Board in its Opinion stated: (Opinion of Board, Docket No. 525, p. 59.)

"Approval of National's application would require a change of planes at New Orleans for a very large part of the traffic moving over the new route."

The Board continued: (Opinion of Board, Docket No. 525, p. 59.)

"The Delta proposal would * * * require a change of planes for traffic west and north of Fort Worth-Dallas and on all traffic moving from Mississippi Valley points through the New Orleans gateway."

In denying Pan American's proposal to operate a service between New Orleans, Havana and San Juan, the Board stated: (Opinion of Board, Docket No. 525, p. 59.)

"However, approval of its proposal would involve a change of planes at New Orleans on all traffic moving over the route, except that destined from and to New Orleans."

In denying Waterman's application in that proceeding, the Board said: (Opinion of Board, Docket No. 525, p. 58.)

"The service proposed by Waterman would necessarily be limited to the transportation of passengers between New Orleans and Tampa, and Havanah and San Juan, and would require all passengers bound for or coming from points in the interior to change planes at New Orleans and Tampa. This carrier therefore would be at a disadvantage in developing the long-haul traffic."

It is a matter of common knowledge, as well as a matter of record before the Board in a recent proceeding, of which this Court may take judicial notice, that Chicago & Southern now proposes an operation which does not con-

template a through-plane service, if and when it inaugurates any service between the co-terminal points Houston-New Orleans and the terminal point San Juan.

IX.

There is attached hereto and marked Petitioner's Exhibit No. 3, a document filed October 11, 1946, by Chicago & Southern Air Lines, Inc., as a matter of public record with the Board, entitled "Petition For Establishment Of Mail Rate", and designated as Docket No. 2564. There is attached to said Petition a statement showing the estimated revenues and expenses of the New Orleans-Havana segment of the route over which it has been certificated, in which it is shown that the estimated cost of operating one round-trip daily over such segment with DC-4 equipment, will amount to 286.88 cents per mile, or 168.96 cents per mile in excess of that shown by its Exhibit No. 30 in Docket No. 525, referred to above. Chicago & Southern Air Lines, Inc., in its petition aforesaid, alleges:

"that unless a temporary rate of compensation for the transportation of mail is fixed shortly after the inauguration of service over said segment of its foreign route, Petitioner, in view of the operating expenses applicable to the operation of its routes, the expenditure of funds required for the purchase of new equipment and the facilities related thereto, will be compelled to seriously impair its working capital * * *".

It asks the Board, therefore, to fix and determine a temporary rate of $1.73 per airplane mile to be paid to Chicago & Southern Air Lines, Inc., from the date of the inauguration of the transportation of mail over the New Orleans-Havana segment of the route, to the date of the determination of a final rate. The mail rate sought is

55.06 cents per plane mile in excess of the total estimated per mile cost of the operation submitted to the Board in Docket No. 525, upon the basis of which the orders sought to be reviewed were issued.

X.

The foregoing facts are illustrative of the necessity of the Court having certified to it the full and complete record of the Board in the proceeding sought to be reviewed herein. It goes to the very heart of the issue as to whether the Respondent had before it substantial evidence in support of its findings.

XI.

The only reason cited by the Respondent in support of its motion to withhold certification and filing of record is contained in paragraph 4 of said motion alleging that the record of the proceeding is currently in use by the Board, and is incomplete in that such proceeding was reopened for certain purposes and is still pending before the Board, pursuant to Respondent's orders of July 12, 1946, Serial No. 4977, which denied rehearing and reconsideration as to Petitioner, but reopened the proceeding as to certain other parties on certain limited issues. This is not a valid reason for granting Respondent's motion, since the matters reopened do not concern the subject matter of this Petition for Review. Petitioner submits that the validity of the Respondent's action in reopening certain portions of this proceeding for further consideration is questionable, if the Respondent is correct in the position that it takes before this Honorable Court. If, as the Respondent contends here, the approval of the President of the United States of its order of May 17, 1946, Serial No. 4793, bars review of such order by this

Honorable Court, then the Board has no power to reopen said proceeding for further consideration on its part. See *Pacific Overseas Airlines Corporation v. Civil Aeronautics Board, et al.*, United States Court of Appeals for the District of Columbia No. 9390, decided October 7, 1946.

Wherefore, Petitioner, Waterman Steamship Corporation, prays (1) that the motion of Respondent to withhold certification and filing of record be denied and (2) that the Respondent be required, by order, to make certification of its record herein, as provided by law.

Respectfully submitted,

FRANCIS H. INGE,
(Francis H. Inge),
Merchants National Bank Bldg.,
Mobile, Alabama,
Attorney for Petitioner.

BON GEASLIN,
STERLING F. STOUDENMIRE, JR.,
JOSEPH M. PAUL,
520 Investment Building,
Washington, D. C.,
Of Counsel.

November 21, 1946.

PETITIONER'S EXHIBIT No. 1.

C. A. B. Docket Nos. 252 et al.
Exhibit No. C. & S. 30.
Witness: Heininger, Braun, Bolander.
Revised Page 1 of 8 pages.

Chicago and Southern Air Lines, Inc.

Estimate of the Annual Operating Statistics, Revenue (Except Mail Revenues) and Additional Expenses Anticipated by the Applicant in the Operation of the Proposed Routes.

	New Orleans to San Juan via Havana, etc. (2 DC 4's)		New Orleans to San Juan via Tampa, etc. (2 DC 3's)	
	Miles	Minutes	Miles	Minutes
Estimated Operating Statistics:				
Length of route and block to block time:				
New Orleans to Tampa	...	...	460	178
Tampa to Miami	...	...	207	81
Miami to Havana	...	...	222	86
New Orleans to Havana	692	231	...	...
Havana to Santiago	465	155	465	180
Santiago to Port-au-Prince	284	95	284	111

Port-au-Prince to Ciudad Trujillo	160	54	160	63
Ciudad Trujillo to San Juan	249	86	249	97
	1,850	621	2,047	796

Scheduled miles (on basis of one round trip per day)	1,350,500	1,494,310
Percent performance	95%	95%
Scheduled miles to be flown	1,282,975	1,419,595
Scheduled airplane hours to be flown	7,555:30	9,684:40
Average number of passengers per mile	20	13
Revenue passenger miles	25,659,500	18,454,735
Fare per passenger mile	7.0¢	7.0¢

Basis for computing express revenue—7% of passenger revenue.
Basis for computing excess baggage revenue—1½% of passenger revenue.

Estimated Revenues and Additional Expenses:

	Amount	Cents per Mile	Amount	Cents per Mile
Revenue:				
Passenger	$1,796,160	140.00	$1,291,830	91.00
Express	125,730	9.80	90,430	6.37
Excess baggage	26,940	2.10	19,370	1.36
	$1,948,830	151.90	$1,401,630	98.73
Additional expenses:				
A. Direct flying expenses	$1,120,890	87.36	$ 608,300	42.85
B. Indirect flying expenses	308,300	24.03	407,830	28.73
C. Traffic and advertising	76,600	5.97	102,100	7.19
D. General and administrative	7,100	.56	7,100	.50
	$1,512,890	117.92	$1,125,330	79.27
Excess of amount of estimated revenues to be derived from proposed routes over estimated additional expenses necessary for their operation	$ 435,940	33.98	$ 276,300	19.46

PETITIONER'S EXHIBIT No. 2.

Excerpt From the Testimony of Carlton Putnam, President of Chicago & Southern Airlines, Inc., in Consolidated Proceeding, Docket No. 525, et al., September 29, 1944.

(Tr. p. 1761.)

"Whereupon CARLTON PUTNAM was called as a witness, and, having been first duly sworn, was examined and testified as follows:"

(Tr. pp. 1770-1771)

"Cross Examination.

"By Mr. Geaslin:

"Q. Mr. Putnam, you are familiar, I take it, with the revenue and operating expenses which the exhibit shows to be estimated here?

"A. In general, yes.

"Q. On the basis of that your company wouldn't need mail pay to support that operation?

"A. That is correct.

"Q. Would you be willing then to undertake the operation with mail pay at the rate that you now receive on your domestic services?

"A. I believe we would.

"Q. And continue it with that same rate?

"A. I believe we would, but I believe that would hardly be a feasible method of operating an air carrier operation.

"Examiner Brown: I don't understand that last statement.

"The Witness: I believe if we were operating a line by an air route it would be the practical thing for us to do to carry mail, passengers and express.

"Examiner Brown: I understood Mr. Geaslin's question to be that you would carry mail at your present rate.

"The Witness: I thought you mean to have mail excluded from our present certificate.

"Mr. Geaslin: Oh, no.

"The Witness: That is correct."

PETITIONER'S EXHIBIT No. 3.

Received Docket Section, Proceedings Division, Oct. 11, 3 34 PM '46, Economic Bureau, Civil Aeronautics Board.

Before the Civil Aeronautics Board.

In the Matter of the Petition of Chicago and Southern Air Lines, Inc., for an order fixing and determining the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith.—Docket No. 2564.

Petition for Establishment of Mail Rate.

Communications with respect to this Petition may be addressed to:
AUSTIN M. ZIMMERMAN,
111 West Monroe Street,
Chicago 3, Illinois.

ZIMMERMAN AND NORMAN,
(Austin M. Zimmerman of Counsel)
R. S. MAURER,
J. M. VERNER,
Attorneys for Petitioner.

October 8, 1946.

Before the Civil Aeronautics Board.

In the Matter of the Petition of Chicago and Southern Air Lines, Inc., for an order fixing and determining the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith.—Docket No. .....

Petition for Establishment of Mail Rate.

Chicago and Southern Air Lines, Inc. (hereinafter referred to as "Petitioner"), respectfully submits to the Civil Aeronautics Board this petition for an order fixing and determining the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith over its route between the co-terminal points Houston, Texas and New Orleans, Louisiana, the intermediate point Havanah, Cuba, and (a) beyond Havana, Cuba, the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, Cuba, the intermediate points Kingstson, Jamaica, Aruba and Curacoa, Netherlands West Indies, and the terminal point Caracas, Venezuela, under section 406 of the Civil Aeronautics Act of 1938, as amended, and section 216.1 of the Economic Regulations promulgated thereunder, and represents and alleges as follows:

I.

That Petitioner is a corporation duly organized and existing under the laws of the State of Delaware, having its principal place of business at the Municipal Airport, Memphis (2), Tennessee.

II.

That Petitioner is an air carrier engaged in the air transportation of persons, property and mail over Route Nos. 8 and 53 and is the holder of a certificate of public convenience and necessity authorizing it to engage in such air transportation over a route between the co-terminal points Houston, Texas, and New Orleans, Louisiana, the intermediate point Havana, Cuba, and (a) beyond Havana, Cuba, the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico; and (b) beyond Havana, Cuba, the intermediate points Kingston, Jamaica, Aruba and Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela.

III.

That, on or about October 15, 1946, Petitioner will inaugurate service over the segment of the aforesaid foreign route between New Orleans, Louisiana, and Havana, Cuba, on the basis of one round trip daily operated with DC-4 equipment and carrying persons, property and mail, and that Petitioner avers, on information and belief, that such schedule will be designated by the Postmaster General for the transportation of mail pursuant to section 405(c) of the Civil Aeronautics Act of 1938. Within a reasonable time thereafter, in progressive stages, service will be inaugurated over the remaining segments of the said route.

IV.

That section 406(c) of the Civil Aeronautics Act and applicable sections of the Economic Regulations issued thereunder provide that in any petition for the deter-

mination of fair and reasonable rates for the carriage of mail shall be included a statement of the rate believed by the petitioner to be fair and reasonable; that Petitioner has had no opportunity to accumulate operational experience upon which to base an estimated rate of compensation required for the transportation of mail over said route; that attached hereto and marked "Exhibit A" and made a part hereof, is a statement showing the estimated expenses and revenue which Petitioner believes will be fairly representative of the expenses and revenues to be experienced in the operation of the aforesaid segment of said route; that based upon said exhibit, Petitioner believes that a rate of $1.73 per airplane mile will be a fair and reasonable rate of compensation required for the transportation of mail over said segment; that Petitioner hereby reserves the right to furnish actual operational data in support of or for the adjustment of said rate for the purpose of retroactive revision thereof in accordance with Petitioner's need.

V.

That under the applicable provisions of the Civil Aeronautics Act of 1938, the Post Office Department is not authorized to compensate an air carrier for the transportation of mail except upon an order of the Civil Aeronautics Board fixing and determining a rate of compensation for such transportation; that any substantial delay in the conduct of hearings and the entry of an order fixing and determining a rate of compensation for the transportation of mail over said route will unduly burden Petitioner's domestic operations; that unless a temporary rate of compensation for the transportation of mail is fixed shortly after the inauguration of service over said segment of its foreign route, Petitioner, in view of the operating expenses applicable to the operation of its

routes, the expenditure of funds required for the purchase of new equipment and the facilities related thereto, will be compelled to seriously impair its working capital; that, therefore, the Board should immediately fix and determine a *temporary* rate of compensation for the transportation of mail over said segment and that thereafter the Board should fix and determine a final rate of compensation for such service.

VI.

Petitioner has served a copy of this petition on the Postmaster General of the United States, Washington, D. C., by sending the same to him by prepaid registered mail prior to the filing of this petition with the Board.

Wherefore, Petitioner prays that the Board fix and determine a temporary rate of $1.73 per airplane mile, to be paid Petitioner from the date of inauguration of the transportation of mail over the said route to the date upon which a fair and reasonable final rate for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith shall be fixed and determined by the Board after notice and hearing, such final rate to be effective retroactively to the inauguration of Petitioner's mail service over the said route.

Respectfully submitted,
CHICAGO AND SOUTHERN
AIR LINES, INC.,
By (Signed) CARLETON PUTNAM,
(Carleton Putnam),
President.

October 8, 1946.

State of Tennessee,
County of Shelby, ss:

Carleton Putnam, being first duly sworn, deposes and says:

That he is the President of Chicago and Southern Air Lines, Inc., a corporation organized and existing under and by virtue of the laws of the State of Delaware; that he has read and is familiar with the contents of the foregoing petition; that he intends and desires that, in granting or denying the prayer of said petition the Civil Aeronautics Board shall place full and complete reliance upon the accuracy of each and every statement therein contained; that he is familiar with the facts set forth in said petition, and, to the best of his information and belief, every statement contained therein is true and no such statement is misleading.

(Signed) CARLETON PUTNAM,
(Carleton Putnam),
President.

Subscribed and sworn to before me, a Notary Public in and for the County of Shelby, State of Tennessee, this 8th day of October, 1946.

(Signed) MATTIE W. WHITTEMORE,
Notary Public.

My commission expires: July 2, 1950.

Chicago and Southern Air Lines, Inc.

EXHIBIT A.

Estimated Statistical Data (Monthly)—New Orleans—Havana Segment.

	One Round Trip Daily	Two Round Trips Daily
Route miles	660	660
Performance	95%	95%
Revenue miles	37,620	75,240
Seat miles available (Note 1)	1,316,700	2,633,400
Passenger miles	1,053,360	1,881,000
Load factor	80.00%	71.43%
Revenue per passenger mile	5.2¢	5.2¢
Freight and express revenue per mile	5.5¢	5.5¢

Note 1. 50-Passenger DC-4's limited to 35 passengers by restrictions of Havana Airport.

Chicago and Southern Air Lines, Inc.

EXHIBIT A.

Estimated Revenues and Expenses—New Orleans—Havana Segment.

	One Round Trip		Two Round Trips	
	Amount Per Month	Cents Per Mile	Amount Per Month	Cents Per Mile
Non-Mail Revenue:				
Passenger	$ 54,775	145.60	$ 97,812	130.00
Freight and express	2,069	5.50	4,138	5.50
Excess baggage	286	.76	572	.76
Total non-mail revenue	$ 57,130	151.86	$102,522	136.25
Operating Expenses:				
Flying operations	$ 24,245	64.44	$ 48,490	64.44
Ground operations	17,607	46.80	22,161	29.45
Flight equipment maintenance	7,524	20.00	15,048	20.00
Ground equipment maintenance	530	1.41	958	1.27
Equipment maintenance—indirect	4,191	11.14	7,877	10.47
Passenger service	9,468	25.17	17,338	23.04

	One Round Trip		Two Round Trips	
	Amount Per Month	Cents Per Mile	Amount Per Month	Cents Per Mile
Traffic and sales	20,152	53.57	27,854	37.02
Advertising and publicity	7,394	19.65	7,520	10.00
General and administrative	5,422	14.41	9,882	13.13
Total—before depreciation	$ 98,533	256.60	$157,128	208.83
Depreciation: Ground equipment	1,266	3.37	1,751	2.33
Flight equipment	10,125	26.91	16,200	21.53
Total	$107,924	286.88	$175,079	232.69
Amortization of development costs	500	1.33	500	.67
Total expenses	$108,424	288.21	$175,579	233.36
Mail pay required to break even	$ 51,294	136.35	$ 73,057	97.10
Net return of 10% on investment	13,623	36.24	20,448	27.18
Total Mail Pay Required	$ 64,926	172.59	$ 93,505	124.28

EXHIBIT A.

Investment August 31, 1946.

	AS REPORTED ON CAB 2780	
Current and accrued assets	$5,213,296.72	
Deferred charges	605,515.56	
Total		$5,818,812.28
Less: Current and accrued liabilities	$3,120,027.84	
Deferred credits	147,601.70	
Total		3,267,629.54
Net Working Capital, Per Cab Form 2780		$2,551,182.74
Equipment loans included in current liabilities		770,000.00
Net Working Capital Adjusted		$3,321,182.74
Net fixed assets		3,154,366.82
Investments and special funds		23,325.00
Deficit		262,226.82
Total Investment		$6,761,101.38
Portion allocated to New Orleans-Havana segment on the basis of one round trip:		
15% of $6,761,101.38		$1,014,165.21

Certification.

I hereby certify that a true copy of the foregoing answer was mailed on this 21st day of November 1946, to each of the following:

Wendell Berge,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

Herbert W. Christenberry,
United States Attorney,
New Orleans, Louisiana.

Edward J. Hickey, Jr.,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

James E. Kilday,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

Emory T. Nunneley, Jr.,
General Counsel,
Civil Aeronautics Board,
Washington, D. C.

John H. Wanner,
Assistant General Counsel,
Civil Aeronautics Board,
Washington, D. C.

H. Don Reynolds,
Civil Aeronautics Board,
Washington, D. C.

R. S. Maurer,
General Counsel,
Chicago & Southern Air Lines, Inc.
Memphis, Tennessee.

R. Emmett Kerrigan,
Deutsch, Kerrigan & Stiles,
Attorneys for Chicago and Southern Air Lines, Inc.,
New Orleans, Louisiana.

FRANCIS H. INGE,
(Francis H. Inge),
Attorney for Petitioner.

MOTION OF CHICAGO & SOUTHERN AIR LINES, INC., TO DISMISS PETITION FOR REVIEW, OR, IN THE ALTERNATIVE, TO AFFIRM ORDERS OF CIVIL AERONAUTICS BOARD.

Filed November 29th, 1946.

In the United States Circuit Court of Appeals for the Fifth Circuit.

U. S. Circuit Court of Appeals.

Filed Nov. 29, 1946.

Oakley F. Dodd, Clerk.

Waterman Steamship Corporation, Petitioner,
vs. No. 11,765.
Civil Aeronautics Board, Respondent.

Motion of Chicago and Southern Air Lines, Inc., to Dismiss the Petition for Review, or, in the Alternative, to Affirm the Orders of the Civil Aeronautics Board.

I.

Now comes Chicago and Southern Air Lines, Inc., sometimes referred to herein as C. & S., appearing herein under and pursuant to the order of the Court, dated November 8, 1946, permitting it to intervene herein as prayed for in its motion filed herein under date of October 30, 1946, and moves the Court to dismiss the Petition for Review filed herein by Waterman Steamship Corporation, Peti-

tioner, on September 6, 1946, and respectfully shows unto the Court that:

1. As will appear from the record filed, or to be filed, herein, C. & S. was a party to the proceeding before the Civil Aeronautics Board, Docket No. 525, and the Certificate of Public Convenience and Necessity complained of in this proceeding by Petitioner was issued to C. & S. upon the order of Respondent Board on May 17, 1946, Serial No. 4793, and approved by the President of the United States on May 22, 1946. Insofar as this proceeding is brought to modify and set aside such Certificate of Public Convenience and Necessity issued to C. & S., as aforesaid, such proceeding affects and seeks to deprive C. & S. of valuable property rights, and accordingly C. & S. is an indispensable party to this proceeding.

2. Petitioner did not make C. & S. a party to this proceeding and no formal notice of this proceeding has ever been served on C. & S. and any judgment affecting said valuable property rights of C. & S. that would have been rendered in this proceeding would have deprived C. & S. of its property without due process of law, in violation of Amendment V of the Constitution of the United States.

II.

Should it be held that C. & S. is not an indispensable party to this proceeding, and should it be further held that this proceeding should not be dismissed for Petitioner's failure to join C. & S. as a respondent herein, or for failure of Petitioner to have notice of this proceeding served on C. & S., then and only in that event, and without prejudice to the rights of C. & S. under the foregoing motion to dismiss, C. & S., in the alternative, further

moves the Court to dismiss said Petition for Review, and respectfully represents unto the Court that:

1. The Order of Respondent Board, dated May 17, 1946, Serial Number 4793, sought to be reviewed herein, is not within the jurisdiction to review conferred upon this Court by Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 646), since that section does not and cannot operate to confer upon this Court jurisdiction to review the issuance or denial of certificates, the issuance or denial of which are subject to the approval of the President of the United States under Section 801 of such Act (49 U. S. C., Sec. 601).

2. The Order of Respondent Board dated May 17, 1946, Serial Number 4793, here sought to be reviewed, was simply an advisory order subject to the approval or disapproval of the President of the United States and was ineffective without the President's approval.

3. Respondent Board's Order of May 17, 1946, Serial Number 4793, sought to be reviewed by the petition herein, is in effect an order of the President of the United States. No jurisdiction to review such order of the President has been conferred on this Court.

4. This Court, by reason of the powers conferred upon the President by Section 801 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 601), subjecting to his ultimate approval the issuance or denial of the certificate applied for, is without power to render a judgment with finality and conclusiveness, and hence the petition presents no case or controversy to which the judicial power extends.

5. The issuance of the Certificate of Public Convenience and Necessity complained of herein by Petitioner rested

solely within the discretion of the President of the United States under Section 801 of said Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 601), and since the action of the President was not required to be predicated on evidence produced at the hearing before Respondent Board in said Docket No. 525, Petitioner has not presented, cannot present, and cannot have presented, a record susceptible of review, and, accordingly, there is and can be no record before this Court for review.

6. The Orders of Respondent Board, dated May 17, 1946, Serial No. 4795, and July 12, 1946, Serial No. 4977, sought to be reviewed herein, relate merely to procedural and other matters addressed to the sound discretion of the Respondent Board, and the petition for review herein fails to allege facts sufficient to authorize review of such orders by this Court.

7. The alleged decision of the Board, contained in its Opinion in Docket No. 525, et al., to the effect that a surface carrier upon an application under Section 401 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 481), must meet the requirements of Section 408(b) of such Act (49 U. S. C., Sec. 488(b)), is upon the face thereof *obiter dictum* and is not an order subject to review under Section 1006(a) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 646(a)).

8. The *dictum* hereinbefore described in the foregoing paragraph hereof, presents no case or controversy to which the judicial power extends.

III.

Should it be held that C. & S. is not an indispensable party to this proceeding, and should it be further held

that this proceeding should not be dismissed for Petitioner's failure to join C. & S. as a respondent herein, or for failure of Petitioner to have notice of this proceeding served on C. & S., or because of the matters set forth in the above and foregoing motions, then and only in that event and without prejudice to the rights of C. & S. under the foregoing motions to dismiss, C. & S., in the alternative, further moves the Court to dismiss said Petition for Review, and respectfully represents unto the Court that:

1. A copy of Respondent Board's order dated May 17, 1946, Serial No. 4793, complained of by the Petitioner herein, was served on Petitioner by Respondent Board on May 24, 1946.

2. On June 24, 1946, Petitioner filed with Respondent Board a petition requesting a rehearing of said order of May 17, 1946.

3. Section 285.11 of the Rules of Practice of Respondent Board under Title IV and Section 1002 (D) to (I) of the Civil Aeronautics Act of 1938, as amended, which was in effect at all times pertinent herein, provides as follows:

". . . petition for rehearing, reargument or reconsideration, must be filed within thirty days after service of the order sought to be vacated or modified. After the expiration of said thirty days, such a petition may be filed only by leave of the Board granted pursuant to formal application upon a showing of reasonable grouds for failure to file the petition within the prescribed thirty-day period.

"No petition for rehearing, reargument or reconsideration filed in accordance with this Section, or the granting thereof, shall operate as a stay of the effective date of the

final order sought to be modified or vacated by such petition, unless specially so ordered by the Board."

4. Accordingly, said Petition for Rehearing, filed by Petitioner with Respondent Board, was not filed within the foregoing prescribed period of thirty days after the service on Petitioner, on May 24, 1946, of said order of May 17, 1946, and Petitioner did not obtain leave of Respondent Board to file said Petition for Rehearing after the expiration of said thirty-day period, nor did Respondent Board order a stay of the effective date of said order of May 17, 1946.

5. Said petition for rehearing so filed by Petitioner on June 24, 1946, could not have been, and was not, entertained by Respondent Board, and in no event did said petition for rehearing operate as a stay of the effective date of said order of May 17, 1946.

6. The petition for a review filed herein on September 6, 1946, was, therefore, not within the sixty-day period provided for in Section 1006 of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 646).

7. In the alternative, the petition for review was not filed within sixty days of July 12, 1946, the date Respondent Board denied said petition for a rehearing, because the present proceeding was not a proper proceeding and should not be considered as filed on September 6, 1946, inasmuch as C. & S. was an indispensable party to such proceeding and was not joined as a party respondent by Petitioner.

8. Said orders of Respondent Board, dated May 17, 1946, and July 12, 1946, respectively, became final and petitioner may not now obtain a review of said orders of Re-

spondent Board by this Court, particularly after C. & S. has gone forward with the establishment of and has inaugurated service provided for in said Certificate of Public Convenience and Necessity, at great expense of time, effort and money.

9. Since said orders dated May 17, 1946, and July 12, 1946, respectively, have become final, any proceeding to set aside or revoke said Certificate of Public Convenience and Necessity issued C. & S. must be brought for proper cause before the Respondent Board and in conformity with Section 401(h) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 481(h)).

IV.

Should it be held that C. & S. is not an indispensable party to this proceeding, and should it be further held that this proceeding should not be dismissed for Petitioner's failure to join C. & S. as a respondent herein, or for failure of Petitioner to have notice of this prpceeding served on C. & S., or because of the matters set forth in the above and foregoing motions, then and only in that event, and without prejudice to the rights of C. & S., under the foregoing motions to dismiss, C. & S., in the alternative, respectfully moves the Court to affirm forthwith the orders and actions sought to be reviewed herein and respectfully shows unto the Court that:

1. If this Court has jurisdiction to review the Order of Respondent Board, dated May 17, 1946, Serial Number 4793, such Order should be affirmed forthwith for the reason that the basis for the approval thereof by the President is not, cannot be, and is not required to be, a matter of record which can be brought before this Court for consideration in connection with such review.

2. The Orders of Respondent Board, dated May 7, 1946, Serial Number 4795, and July 12, 1946, Serial Number 4977, relate to mere procedural and other matters addressed to the sound discretion of the Respondent Board and the Petition for Review herein alleges no facts to indicate any abuse by the Respondent Board of its discretion.

3. The application of Petitioner for a Certificate of Public Convenience and Necessity was disposed of wholly upon its merits by Respondent Board, and the alleged decision contained in the Board's opinion in Docket No. 525, et al., to the effect that a surface carrier applicant for such a certificate must meet the requirements of Section 408(b) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C., Sec. 488(b)) is upon the face thereof *obiter dictum* and not essential to the adjudication of the merits of Petitioner's application.

Wherefore, Chicago and Southern Air Lines, Inc., respectfully moves that the Petition for Review herein be dismissed, or, in the alternative, that the orders and actions of the Respondent Board be affirmed forthwith and the Petition for a Review denied.

(Signed) R. EMMETT KERRIGAN,
(R. Emmett Kerrigan),
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Chicago and Southern Air Lines, Inc.

R. S. MAURER,
J. M. VERNER,
MARIAN MAYER,
Of Counsel.

In the United States Circuit Court of Appeals for the Fifth Circuit.

Waterman Steamship Corporation, Petitioner,
vs. No. 11,765.
Civil Aeronautics Board, Respondent.

NOTICE OF MOTION TO DISMISS OR AFFIRM FORTHWITH.

To: Francis H. Inge, Esquire,
Attorney for Petitioner,
403 Merchants National Bank Building,
Mobile 6, Alabama.

Bon Geaslin, Esquire,
Sterling F. Stoudenmire, Jr., Esquire,
Joseph M. Paul, Esquire,
Of Counsel for Petitioner,
520 Investment Building,
Washington, D. C.

Edward J. Hickey, Jr., Esquire,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

H. Don Reynolds, Esquire,
Chief, Enforcement & Litigation Section,
Civil Aeronautics Board,
Commerce Building,
Washington, D. C.,
Attorneys for Respondent, Civil Aeronautics Board.

Please take notice that, upon the motion attached hereto, Chicago and Southern Air Lines, Inc., will move this

Court, as soon as the Court designates a time at which counsel can be heard on said motion, for an order to dismiss the petition to review herein, or, in the alternative, for an order forthwith affirming the orders sought to be reviewed thereby, on the grounds set forth in the aforesaid motion.

Dated this 29th day of November, 1946.

(Signed) R. EMMETT KERRIGAN,
(R. Emmett Kerrigan),
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Chicago and Southern Air Lines, Inc.

R. S. MAURER,
J. M. VERNER,
MARIAN MAYER,
Of Counsel.

CERTIFICATE OF SERVICE.

I hereby certify that I have this day served a copy of the foregoing notice and motion to dismiss the petition for review, or, in the alternative, to affirm the orders of the Civil Aeronautics Board, on petitioner and respondent herein by mailing a copy thereof, postage prepaid, to:

Francis H. Inge, Esquire,
Attorney for Petitioner,
403 Merchants National Bank Building,
Mobile 6, Alabama.

Bon Geaslin, Esquire,
Sterling F. Stoudenmire, Jr., Esquire,

Joseph M. Paul, Esquire,
Of Counsel for Petitioner,
520 Investment Building,
Washington, D. C.

Edward J. Hickey, Jr., Esquire,
Special Assistant to the Attorney General,
Department of Justice,
Washington, D. C.

H. Don Reynolds, Esquire,
Chief, Enforcement & Litigation Section,
Civil Aeronautics Board,
Commerce Building,
Washington, D. C.,
Attorneys for Respondent, Civil Aeronautics Board.

Dated this 29th day of November, 1946.

(Signed) R. EMMETT KERRIGAN,
(R. Emmett Kerrigan),
of
DEUTSCH, KERRIGAN & STILES,
Attorneys for Chicago and Southern Air Lines, Inc.

REPLY OF RESPONDENT AND SUPPORTING MEMO. ON MOTION TO WITHHOLD CERTIFICATION AND FILING OF RECORD.

Filed December 2, 1946.

U. S. Circuit Court of Appeals.

Filed Dec. 2, 1946, Oakley F. Dodd, Clerk.

In the United States Circuit Court of Appeals for the Fifth Circuit.

Waterman Steamship Corporation, Petitioner,
vs. No. 11,765.
Civil Aeronautics Board, Respondent.

Reply of Respondent and Supporting Memorandum on Motion to Withhold Certification and Filing of Record.

To the Honorable, The United States Circuit Court of Appeals for the Fifth Circuit.

Now comes the Respondent, Civil Aeronautics Board, and in reply to the Answer of Petitioner to Motion of Respondent to Withhold Certification and Filing of Record respectfully represents unto the Court, that:

1. Respondent admits the allegations of paragraph I of Petitioner's Answer except insofar as such allegations are intended to infer that Respondent has failed to perform any duty lawfully imposed upon Respondent, which allegation sand inference Respondent specifically denies.

2. As to paragraph II of said Answer, Respondent denies the allegations of Petitioner that it would not be

possible for this Court to pass upon the Petition for Review without an examination of the entire record. The Motion of Respondent heretofore filed herein to Dismiss the Petition for Review, or in the alternative, to Affirm Respondent's Orders sufficiently rests upon jurisdictional and other matters clearly apparent upon the face of the Petition for Review and fully determinable from the abbreviated record heretofore filed herein.

3. As to paragraph III of said Answer, Respondent denies that its order Serial No. 4793, dated May 17, 1946, approved by the President on May 22, 1946, is reviewable by this Honorable Court upon the Petition for Review heretofore filed herein, and Respondent denies that the Court can not so determine without full review by this Court of the entire record before the Board.

4. As to paragraph IV of said Answer, Respondent denies that any issue of fraud or misrepresentation is before this Honorable Court upon the Petition for Review filed herein.

5. As to paragraph V of said Answer, Respondent denies the allegations thereof in the manner and form set forth therein, and denies that exhibits, testimony or other matters therein referred to demonstrate the necessity for a certification of the whole record. Respondent further denies that any of such exhibits, testimony or other matters have any relevancy to the question of this Court's jurisdiction or the sufficiency of the Petition for Review.

6. With respect to the allegations, recitations and references to testimony, exhibits and other matters set forth in such paragraphs VI to X inclusive of said Answer, Respondent adopts paragraph 5 hereof, and further denies that the material set forth in such paragraphs VI to X inclusive is in any manner relevant to any issues raised

by Respondent's Motion to Withhold Certification and Filing of Record, or to Respondent's Motion to Dismiss or Affirm forthwith; Respondent further denies that any of such allegations, recitations or references are illustrative of any necessity for the Court's having certified to it the full and complete Record of the Board in the proceeding sought to be reviewed upon the Petition for Review filed herein.

7. With respect to paragraph XI of said Answer, Respondent denies the allegations and arguments therein set forth and denies that Respondent's action in reopening certain portions of the proceedings referred to for further consideration is of questionable validity or was taken without full and proper authority therefor. Respondent further denies that the case of *Pacific Overseas Airlines Corporation v. Civil Aeronautics Board, et al.* (C. C. A., D. C., October 7, 1946) cited by Petitioner has any other effect than to demonstrate lack of jurisdiction of a Court of Appeals to grant a Petition for Review such as Petitioner has filed herein.

8. As to all allegations of ultimate facts contained in said Answer not hereinbefore expressly admitted or denied, Respondent hereby denies the same.

MEMORANDUM IN SUPPORT OF REPLY.

It is respectfully submitted that the Answer of Petitioner to Motion of Respondent to Withhold Certification and Filing of Record fails to set forth any matters of proper pleading sufficient to require or justify denial by this Honorable Court of Respondent's Motion. Said "Answer" is composed largely of highly argumentative and irrelevant matter not before this Court on the Petition for Review filed herein and matter wholly extraneous to any of the

issues presented by Respondent's Motion to Withhold Certification and Filing of the Record until further order of the Court.

Respondent has filed herein an abbreviated record containing all orders and related documents referred to in the Petition for Review and all other such documents necessary or appropriate for the purposes of the Court in determining whether, as Respondent contends, such Petition is wholly insufficient and fails for want of jurisdiction. Respondent's purpose in filing such an abbreviated record is to avoid unnecessary administrative and judicial burdens and is fully consistent with the proper dispatch of the Court's business and the ends of justice.

The procedure which has been followed by Respondent is consistent with the purposes and intent of the Federal Rules of Civil Procedure governing appeals to this Court from a District Court. Rule 75 governing the "Record on Appeal to a Circuit Court of Appeals" contains the following:

"(e) *Record to Be Abbreviated.* All matter not essential to the decision of questions presented by the appeal shall be omitted. . . ."

"(j) *Record for Preliminary Hearing in Appellate Court.* If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, . . . or for any intermediate order, the Clerk of the District Court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceeding below as is needed for that purpose."

In analogy to the above practice and in accordance with common judicial practice upon motions to dismiss, Respondent here has filed an abbreviated record upon which Respondent respectfully contends that a complete disposition may be made of the Petition for Review herein. The instant Motion merely requests that Respondent be relieved from the provisions of an apparently inconsistent requirement set forth in Rule 38 of the Rules of this Honorable Court, which refers to the certification and filing of "the entire record". Respondent's Motion also seeks to avoid any possible accusation of non-compliance with statutory duties, which might result from an interpretation that, for the purposes of a motion to dismiss, the provisions of Section 1006(c) of the Civil Aeronautics Act of 1938, as amended, require anything more than such abbreviated record in that the Board is required to ". . . certify and file in the Court a transcript of the record, if any, upon which the order complained of was entered." Respondent is currently preparing and will file with this Court a brief fully disclosing the authorities and reasons in support of Respondent's Motion to Dismiss. The temporary relief from filing the complete record until after the Court shall have had opportunity to consider its decision on the sufficiency of the Petition for Review could result in harm to no one.

Petitioner alleges that the Board is seeking a limited review of its orders by this Court. Such is not the case. The Board merely is requesting that this Court determine its jurisdiction herein and the sufficiency of the Petition for Review in advance of requiring the filing of a complete and voluminous record of the proceedings before the Board, which record contains many practically inseparable matters not related to the Petition for Review. If the Court is without jurisdiction, or the Petition for Review is insufficient, as contended by Respondent, the act of filing the transcript will be futile. Cf. *Okin v. Securities and*

Exchange Commission, 143 F(2d) 943, 945 (C. C. A. 2nd, 1944).

Petitioner further states that it would not be possible for the Court to pass on the Petition for Review herein without an examination of the entire record. The question of the Court's jurisdiction is a question of law to be determined apart from the record of the Board's proceedings. It has been held that a Circuit Court of Appeals has jurisdiction to grant a Motion to Dismiss a Petition for Review of the orders of an administrative agency without first requiring such agency to file a transcript of the record of its proceedings with the Court. *Okin v. Securities and Exchange Commission, supra.* The Court, at a time when no transcript of the record had been filed with it, stated at page 945 of its opinion:

". . . a court always has jurisdiction to determine whether or not it lacks power to hear and determine the controversy sought to be presented."

The Board has filed a partial record with the Court. The Supreme Court has indicated that, in a case involving an appeal from orders of the Securities and Exchange Commission, the necessity of a record, and the extent thereof, in connection with a Motion to Dismiss or Affirm is a matter resting within the discretion of the Court. *American Power Co. v. Securities and Exchange Commission*, 325 U. S. 385, 392 (1945).

Respondent in the case before this Honorable Court has not refrained from filing *any record* but has actually filed a partial record which it contends is sufficient for disposition upon adequate legal grounds of Respondent's Motion to Dismiss and the entire controversy herein. Until such time as the issues presented thereby may have been disposed of adversely to Respondent's contentions, it is respectfully submitted that Petitioner's "Answer" in opposition to the preliminary motion, particularly when

such Answer contains argument, inferences and conjecture wholly irrelevant to any of the issues raised by any of the pleadings herein should not be entertained.

Wherefore, Respondent Civil Aeronautics Board respectfully requests that the Court grant Respondent's Motion for the entry of an order authorizing Respondent to Withhold Certification and Filing of a copy of the Record of the proceeding before Respondent in Docket No. 525, et al. until further order of the Court.

Respectfully submitted,

(Signed) EDWARD J. HICKEY, JR.,
(Edward J. Hickey, Jr.),
Special Assistant to the Attorney General.

(Signed) H. DON REYNOLDS,
(H. Don Reynolds),
Chief, Enforcement & Litigation Section, Civil Aeronautics Board, Attorneys for Respondent, Civil Aeronautics Board.

Of Counsel

(Signed) WENDEL BERGE,
(Wendell Berge),
Assistant Attorney General,

(Signed) HERBERT W. CHRISTENBERRY,
(Herbert W. Christenberry),
United States Attorney,

(Signed) JAMES E. KILDAY,
(James E. Kilday),
Special Assistant to the Attorney General,

(Signed) EMORY T. NUNNELEY, JR.,
(Emory T. Nunneley, Jr.),
General Counsel, Civil Aeronautics Board,

(Signed) JOHN H. WANNER,
(John H. Wanner),
Assistant General Counsel,
Civil Aeronautics Board.

CERTIFICATION OF SERVICE.

I hereby certify that a true copy of the foregoing Reply of Respondent and Supporting Memorandum on Motion to Withhold Certification and Filing of Record was mailed this date to:

Francis H. Inge, Esq.,
403 Merchants National Bank Building,
Mobile 6, Alabama.

Bon Geaslin, Esq.,
520 Investment Building,
Washington 5, D. C.

R. Emmett Kerrigan, Esq.,
Hibernia Bank Building,
New Orleans 12, Louisiana.

This 29th day of November, 1946.

(Signed) EDWARD J, HICKEY, JR.,
(Edward J. Hickey),
Special Assistant to the Attorney
General.

[fol. 407] ARGUMENT AND SUBMISSION

Extract from the Minutes of January 27, 1947

No. 11765

WATERMAN STEAMSHIP CORPORATION

versus

CIVIL AERONAUTICS BOARD

On this day this cause was called on the motions to dismiss filed by Civil Aeronautics Board, respondent, and Chicago & Southern Air Lines, Inc., Intervener, and, after argument by Edward J. Hickey, Jr., Esq., Special Assistant to the Attorney General, and H. Don Reynolds, Esq., Chief, Enforcement & Litigation Section, Civil Aeronautics Board, for Respondent, and R. Emmett Kerrigan, Esq., for Chicago & Southern Air Lines, Inc., Intervener, and Joseph M. Paul, Jr., Esq., and Francis H. Inge, Esq., for Waterman Steamship Corporation, petitioner, was submitted to the Court.

[fol. 408] OPINION OF THE COURT—Filed February 14, 1947

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11765

WATERMAN STEAMSHIP CORPORATION, Petitioner,

versus

CIVIL AERONAUTICS BOARD, Respondent

Petition for Review of Order of Civil Aeronautics Board, Sitting at Washington, D. C.

(February 14, 1947)

Before Sibley, Hutcheson, and Lee, Circuit Judges

SIBLEY, Circuit Judge:

On May 17, 1946, the Civil Aeronautics Board made a proposed decision and order on its consolidated docket #525 in which some fifteen applications for certificates

to engage in air transportation between points in the United States and points in Latin America, including [fol. 409] Mexico, Colombia, Venezuela, Brazil, Cuba, and Puerto Rico, were disposed of. The President approved the order on May 22, 1946, and it was served on the parties affected on May 24, 1946. By the order Waterman Steamship Corporation was denied a certificate of public convenience and necessity for the route it sought, and one was granted to a rival applicant, Chicago and Southern Air Lines, Inc. The latter we will refer to as C. and S. and the former as Waterman. On Sept. 6, 1946, Waterman filed in this court a petition for review of certain portions of the order affecting it and C. and S. under Section 1006 of the Civil Aeronautics Act, 49 U. S. C. A. §646, and a copy was transmitted to the Board. The Board on Nov. 4, 1946, moved to dismiss the petition mainly on the ground that this order, because approved by the President, was not subject to judicial review; and alternatively that if the petition be not dismissed the order be forthwith affirmed for the same reason. On Nov. 29, 1946, C. and S. was allowed to intervene, and moved to dismiss the petition on the same grounds; and also because C. and S. was an indispensable party and had not been served with formal notice of it; and because the petition was not filed within sixty days from service of the order on May 24, 1946, as required by Section 1006. A skeleton record only has been filed, to save the preparation of a very voluminous one if the petition is to be dismissed. The motions to dismiss only are now presented for decision.

1. As to timeliness, it appears that the order was published as such on May 24, 1946; on June 24, 1946, a motion for reconsideration was filed by Waterman, which the Board entertained and considered on its merits and over- [fol. 410] ruled on July 12, 1946. The petition for review was well within the sixty days allowed by the statute from the latter date. The rules of procedure of the Board provide for such a motion filed within thirty days after the service of the order, or at a later date by leave of the Board. It is argued by Waterman that the thirty days expired on a Sunday and for that reason an extra day was by a general principle permitted. We do not think it matters. The Board did not reject the motion because not in accord with its rule, but decided it on its merits. It does

not now raise any such contention. We think the motion, although it did not by the Board's rules supersede or suspend the order, operated to retain the Board's authority over the order, so that the order overruling the motion should be taken as the final "entry of such order" intended by the statute to start the running of the sixty-day period for judicial review. *Braniff vs. Civil Aeronautics Board*, 147 Fed. (2) 152; *Saginaw Broadcasting Co., vs. Federal Communications Commission*, 96 Fed. (2) 554.

2. C. and S. is manifestly interested in the review and entitled to be heard. Section 1006, however, does not provide for any service except upon the Board. We should perhaps rightly have ordered some service or notice to C. and S., but this is not now necessary for it has voluntarily appeared by intervention. The petition should not be dismissed on a question of parties.

3. There remains the larger question whether an order of the Board which has the approval of the President under [fol. 411] Section 801 of the Act[1] may be reviewed by this court under Sec. 1006. By Sec. 401, 49 U. S. C. A. § 481, certificates must (with exceptions not here material) be obtained from the Board by "air carriers," including those undertaking foreign transportation, and the Board may revoke them. By Sec. 402, 49 U. S. C. A. § 482, "foreign air carriers" must obtain permits from the Board in a similar manner. We learn from the definitions in Sec. 1, 49 U. S. C. A. § 401, (2), (19), that "air carrier" means a citizen of the United States who undertakes air transportation, while "foreign air carrier" means a person not such citizen who

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[1] 49 U. S. C. A. § 601. "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions and limitations contained in any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between the places in the same territory or possession, or any permit issuable to any foreign air carrier under Section 482 shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Administrator of Civil Aeronautics before hearing thereon, and all decisions thereon by the Administrator of Civil Aeronautics shall be submitted to the President before publication thereof . . ."

engages in foreign air transportation. The former is granted a certificate and the latter a permit under different sections of the Act. But by the precise terms of Sec. 801 if the certificate of the United States citizen covers foreign air transportation its issuance, denial, revocation, etc., are subject to the approval of the President, and so also are such matters as to any permit issuable to any foreign air carrier. We are emphasizing the separateness of the provisions as to the certificates of the citizen from those as to the permit of the foreigner. Now Sec. 1006 (a), 49 U. S. C. A. § 646 (a), we think is equally clear and precise: "*Any order*, affirmative or negative, issued by the Board under [fol. 412] this Act, *except any order in respect of any foreign air carrier* subject to the approval of the President as provided in Section 801 of this Act, shall be subject to review by the Circuit Courts of Appeals of the United States. . . ." The language here shifts from certificates and permits to *orders* affirmative or negative of the Board, but it is evident that certificates and permits are to be issued, denied, revoked, or otherwise dealt with by the Board through orders, which are frequently so named throughout the Act. All such orders are reviewable with one exception—an order in respect of a foreign air carrier subject to approval of the President as provided in Section 801. The words are too plain to be misunderstood. If Congress had intended to except all orders made subject to Presidential approval by Section 801, fewer words would have sufficed. To make that meaning we must eliminate the words "in respect of any foreign air carrier," or we must change them to read "in respect of any foreign air transportation." Though we might think this change would make a better law, we have no right thus to amend it. The Bill which passed both the House and the Senate and was approved by the President does not read that way.* That Bill became the law, by the express provision of the Constitution, Art. 1, Sec. 7. Since no foreign air carrier is here concerned and no order has been made concerning such a carrier, the one exception Congress has made does not apply.

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* It is stated in argument and not denied that the Bill as introduced did read "in respect of foreign air transportation" and was changed in Committee to the present words, showing a deliber- choice of the latter.

We recognize of course that "any order affirmative or negative" does not mean interlocutory or indecisive orders, [fol. 413] but refers only to the Board's final conclusions. We recognize, too, the important role given the President in Sec. 801 in respect of foreign air transportation both by our citizens and by foreigners, because of complications ever possible in our foreign relations. While the right to regulate foreign commerce is vested by the Constitution in the Congress, Art. 1, Sec. 8 (3), the President is charged with a peculiar responsibility for our relations, by treaty and otherwise, with other countries, and is often possessed of information not proper to be made public, which may cause what the Board has concluded to be commercially desirable seem to him politically or otherwise undesirable. Such considerations probably led the Congress to give the President what amounts to an absolute veto as to all orders of the Board respecting all the matters named in Sec. 801. Since the order would still be the order of the Board, this veto power we think would persist as to any modification of such an order by the court under Section 1006 (c) or any new order framed by the Board under direction of the court. The court has no power to question or review either the approval or disapproval of the President. He does not have even to state his reasons. On review under Sec. 1006 the court has only to consider the order of the Board and whether it is according to the Act. Congress has made the Board its regulatory agent touching public convenience and necessity, the fitness, willingness and ability of the applicant for a certificate or permit to operate successfully, and other things named in the Act; and the Board's action is subject to court review to the extent the Act provides and permits. It is not final till the Board and the court have [fol. 414] completed their functions. Thereafter the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801. As to foreign air carriers the court has no function at all, and the President's action on the Board's order is final and unreviewable.

We are aware that this question was decided otherwise in *Pan American Airways Co. vs. Civil Aeronautics Board*, 121 Fed. (2) 810. The court there leaned upon *United States vs. Bush*, 310 U. S. 371. We think the Bush case does not apply. It involved Sec. 336 of the Tariff Act of 1930, 46 Stats. 696, and the Tariff Commission set up in that Act. That Commission was authorized to make no orders, but

only to investigate and report to the President, who then by proclamation would make the recommended changes in the tariff rates "if in his judgment" they ought to be made. The only action was taken by the President. The Aeronautics Board has powers similar to those of the Interstate Commerce Commission, and makes orders of many kinds affecting air carriers and air commerce. The certificates and permits here involved are issued or denied on the orders of the Board. The President cannot make any order, though under Sec. 801 he can frustrate some of them. Under that section copies of applications and proposed certificates and permits are to be transmitted to him before a hearing, and decisions are to be submitted to him before publication. Apparently this is for his information and to give him opportunity to look into the matter and give the Board any facts he may desire. He is not required to do anything until the Board reaches a decision and is ready to make an order, when he may approve it, or stop it by a [fol. 415] disapproval. If he approves, it means only that he consents. It does not deprive the court of its power to see that the order is otherwise according to law, except as to foreign air carriers. Because of our view that the President's power to disapprove applies as well after as before the court acts we see no chance of a deadlock, no conflict of function. The Act clearly defines the function of court and President. Each may be expected to respect the function of the other. Nor is there such prospect of futility as ought to deter the court. Courts try criminal cases notwithstanding an executive pardon may frustrate a conviction. They constantly reach conclusions in all kinds of cases undeterred by the chance that a higher court may disapprove their orders.

We therefore esteem it our duty to entertain this petition under the Act. We will, of course, give proper regard to the presumptions due to the Board's action in favor of C. and S. If it should appear to us or to the Supreme Court that that action was for any reason unlawful, so that C. and S. cannot serve the proposed air route, it may be that both the Board and the President would reconsider the denial of a certificate to Waterman. We as yet on a skeleton record have little idea of what the merits of the controversy may be. We are holding merely that we have the jurisdiction and the duty to find out.

The motions to dismiss are denied

[fol. 16] JUDGMENT

Extract from the Minutes of February 14, 1947

No. 11765

WATERMAN STEAMSHIP CORPORATION

versus

CIVIL AERONAUTICS BOARD

This cause came on to be heard on the motions of the respondent, Civil Aeronautics Board, filed on November 4, 1946, and The Chicago & Southern Air Lines, Inc., Intervener, filed on November 29th, 1946, to dismiss the petition for review, and on the reply of petitioner thereto, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the said motions to dismiss the petition for review be, and the same are hereby, denied.

[fol. 417] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 407 to 416 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 11765, wherein Waterman Steamship Corporation is petitioner, and Civil Aeronautics Board is respondent, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 406 are identical with the record upon

which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 2nd day of May, A. D. 1947.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal.)

[fol. 418] Supreme Court of the United States, October Term, 1947

No. 78

Order Allowing Certiorari—Filed June 16, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 419] Supreme Court of the United States, October Term, 1947

No. 88

Order Allowing Certiorari—Filed June 16, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 6 1947
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1946.

No. 940 78

CHICAGO AND SOUTHERN AIR LINES, INC.,
Petitioner,

versus

WATERMAN STEAMSHIP CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1946.

No. .....

CHICAGO AND SOUTHERN AIR LINES, INC.,
Petitioner,

versus

WATERMAN STEAMSHIP CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes Chicago and Southern Air Lines, Inc., a Delaware corporation, and respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Fifth Circuit, entered February 14, 1947, denying petitioner's motion to dismiss the petition for review filed by Waterman Steamship corporation, respondent.[1]

[1] Also referred to herein as Waterman.

OPINION BELOW.

The opinion of the court below is reported in 159 F(2) 828.

JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, sec. 1, (28 U. S. C. 347(a), 43 Stat. 938). The decree of the lower court was rendered February 14, 1947. There was no application for a rehearing.

QUESTIONS PRESENTED.

The first question presented by this petition is whether a United States Circuit Court of Appeals has jurisdiction to review a decision of the Civil Aeronautics Board, approved by the President of the United States, under Section 801 of the Civil Aeronautics Act of 1938, as amended,[2] granting a certificate of public convenience and necessity for overseas and foreign air transportation.

A still further question is whether a petition to review a decision of the Civil Aeronautics Board,[3] filed under Section 1006 of the Act,[4] must be filed within sixty days after the entry of the decision, when no stay thereof is obtained.

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[2] 49 USC 601; June 23, 1938, c. 601, sec. 801, 52 Stat. 1014; Reorg. Plan No. III, sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2109, 54 Stat. 1233. The Civil Aeronautics Act, as amended, is referred to herein simply as the Act.

[3] Referred to herein simply as the Board.

[4] 49 USC 646, 54 Stat. 1235. See note 12, infra.

SUMMARY STATEMENT.

In 1940 Waterman Air Line, Inc., a subsidiary of respondent, filed an application with the Board, under Section 401 of the Act,[5] for a certificate of public convenience and necessity to engage in air transportation between the United States and Puerto Rico. Thereafter, respondent itself was substituted as the applicant.

Meanwhile, petitioner herein filed with the Board an application seeking a certificate of public convenience and necessity to engage in air transportation between New Orleans and San Juan, (a) via Cuba, Haiti, and the Dominican Republic, and (b) via Tampa, Miami, Cuba, Haiti and the Dominican Republic. Petitioner herein also filed applications for other routes in the Caribbean and Central American areas. The applications filed on behalf of petitioner and of respondent were consolidated with many others in a proceeding referred to as "Additional Service to Latin America".[6]

Hearings on the applications were held before examiners of the Board. Briefs were filed with the examiners, and they submitted their report on March 5, 1945, serving copies on all parties. Exceptions and briefs were filed by all parties, who were then allowed to present arguments before the Board from April 30 to May 5, 1945.

Finally, on May 17, 1946, the Board rendered an opinion in said proceeding.[7] Included in that opinion was the decision that petitioner should be issued a certificate of public convenience and necessity for foreign and overseas air transportation of persons, property and mail "between

[5] 49 USC 481, 52 Stat. 987.
[6] Docket 525 of the Civil Aeronautics Board.
[7] R. p. 118, et seq.

the co-terminal points, New Orleans, La. and Houston, Tex., the intermediate point Havana, Cuba, and (a) beyond Havana, Cuba, the intermediate points Camaguey, Cuba, Port-au-Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, Cuba, the intermediate points Kingston, Jamaica, Aruba, Netherlands West Indies, Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela." At the same time, the Board denied the applications of respondent and others for all or portions of the foregoing routes; also, the Board denied respondent's previous motion of May 6, 1946, which had requested the Board to re-open the proceedings to receive further evidence and for re-argument, on the proposed New Orleans-San Juan route.

The Board's decision was referred to the President of the United States in accordance with the provisions of Section 801 of the Act,[8] and on May 22, 1946, the President approved the decision of the Board to certificate petitioner and to deny the other applications. On May 24, 1946, a copy of the Board's decision as approved by the President was served upon Waterman and on the same day the certificate was issued to petitioner.

On June 24, 1946, Waterman filed a request for rehearing. The rules of the Board, which were promulgated under the authority of Section 1005 of the Act,[9] provide that:[10]

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[8] 49 USC 601, 52 Stat. 1014.

[9] 49 USC 645; June 23, 1938, c. 601, sec. 1005, 52 Stat. 1023, Reorg. Plan No. IV, sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235.

[10] Sec. 285.11 of the Rules of Practice of the Civil Aeronautics Board under Title IV and Section 1002 (d) to (I) of the Civil Aeronautics Act of 1938 as amended.

> "No petition for rehearing, reargument or reconsideration filed in accordance with this Section, on the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specially so ordered by the Board."

No stay of the Board's opinion of May 17, 1946 was requested by Waterman and none was ordered by the Board. Moreover, on July 12, 1946, less than sixty days after the rendition and the service of the opinion of the Board, the Board denied the application for a rehearing.

Thereafter, on September 6, 1946, considerably more than sixty days after the rendition and service of the Board's opinion, Waterman filed a petition in the court below, asking for a review of the foregoing action by the Board.

After the expiration of sixty days, a petition may be filed in the Circuit Court of Appeals only upon leave of that court after a showing of reasonable grounds for failure to file the petition theretofore.[11] No such showing was made by Waterman and the court was not called upon and did not make such a finding in that regard.

The Board filed a motion to dismiss the petition to review for lack of jurisdiction. After being granted leave by the court below to intervene, petitioner herein also moved to dismiss Waterman's petition to review.

Petitioner's motion to dismiss was predicated, in part, on the ground that the Circuit Court of Appeals lacked

[11] Sec. 1006 of the Act. For complete citation see infra, note 12.

jurisdiction to review the award, approved by the President, of a certificate of public convenience and necessity for overseas and foreign transportation. In support of its position, petitioner showed, among other things:

1. The decision of the Board was not within the jurisdiction to review conferred upon the court below by Section 1006(a) of the Act,[12] since that section does not and cannot operate to confer upon that court jurisdiction to review the issuance or denial of certificates, the issuance or denial of which is subject to the approval of the President of the United States under Section 801 of the Act.[13]

2. The decision of the Board was simply an advisory one subject to the approval or disapproval of the President of the United States and was ineffective without the President's approval.

3. The decision of the Board was in effect an order of the President of the United States. No jurisdiction to review such an order of the President has been conferred on the court below.

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[12] 49 USC 646, June 23, 1938, c. 601, sec. 1006, 52 Stat. 1024, Reorg. Plan No. IV, sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235. The pertinent provisions of this section are: "Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this chapter, shall be subject to review by the circuit court of appeals of the United States . . . upon petition filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

[13] 49 USC sec. 601. The pertinent provisions of this section are: "The issuance, denial . . . and the terms . . ., contained in any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 482, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof."

4. The court below by reason of the powers conferred upon the President by Section 801 of the Act,[14] subjecting to his ultimate approval the issuance or denial of the certificate in question, is without power to render a judgment with finality and conclusiveness, and hence the petition for review presented no case or controversy to which the judicial power extends.

5. The issuance of the certificate of public convenience and necessity to petitioner rested solely within the discretion of the President of the United States under Section 801 of the Act, and since the action of the President was not required to be predicated on evidence produced at the hearing before the Board, respondent Waterman did not present, cannot present, and cannot have presented, a record susceptible of review, and, accordingly, there is and can be no record before the court below for review.

Petitioner's motion to dismiss was also predicated on the following ground:

Waterman's petition for review filed on September 6, 1946, was not within the 60-day period allowed under Section 1006 of the Act.[15]

After hearing, the court below rendered its decision denying the motions to dismiss. In answering in the affirmative the first question above stated the court in the course of its opinion said:

"We are aware that this question was decided otherwise in Pan-American Airways Company vs. Civil Aeronautics Board, 121 Fed. (2d) 810."

[14] Note 13, supra.
[15] Note 12, supra.

REASONS FOR GRANTING THE PETITION.

1. The decision of the Circuit Court of Appeals for the Fifth Circuit is directly in conflict with the decision on the same question rendered by the Circuit Court of Appeals for the Second Circuit in *Pan-American Airways vs. Civil Aeronautics Board*, 121 F. (2d) 810,[16] and this conflict should be resolved by this Court.

2. The decision of the court below involves important questions of federal law, which have not been, but should be, settled by this Court.

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[16] In the Pan-American case the court said:

"It seems clear that in approving or disapproving of certificates of public convenience and necessity the President must frequently act on information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted the certificates. There is nothing in the Act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, not the Board, the ultimate arbiter. United States vs. George S. Bush & Company, 310 U. S. 371, 60 S. Ct. 944, 84 L. ed. 1259.

"If the President has approved of a certificate authorizing a carrier to engage in foreign air transportation and we should attempt to review the order authorizing the issuance of the certificate, we would be placed in a position where we might be obliged to reverse a tribunal whose subsequent action the President would decline to approve. His sweeping powers are illustrated by the fact that under Section 801 he is obliged not only to approve or disapprove of a certificate for foreign air transportation, but even to approve or disapprove of the denial of such a certificate by the Board. It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. United States v. Belmont, 301 U. S. 324, 57 S. Ct. 758, 81 L. ed. 1134; United States v. Curtis Wright Corp., 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in the Executive discretion that it cannot be regarded as authorized by Section 1006(a). . . ."

3. The court below has decided federal questions in a way probably in conflict with the applicable decisions of this Court.

4. The petition should be granted at this juncture in this proceeding because:

(a) The decision of the court below is final insofar as the question of jurisdiction is concerned. *George A. Fuller Co. vs. Otis Elevator*, 245 U. S. 489; *Ex Parte Querin*, 317 U. S. 1.

(b) This Court has reviewed by writ of certiorari a similar question of jurisdiction in a similar proceeding before a decision on the merits. *Federal Power Commission vs. Pacific Power & Light Co.*, 307 U. S. 156.

(c) The judgment below involves an issue "fundamental to the further conduct of the case". *United States vs. General Motors Corporation*, 323 U. S. 373, 377; *Land vs. Dollar*, No. 207, October Term, 1946, decided April 7, 1947.

(d) The granting of this petition would expedite a determination of the litigation.

(e) Inasmuch as petitioner has begun operations under the certificate of public convenience and necessity presently in dispute and desires to extend its operations thereunder, a speedy determination of petitioner's right is necessary and equitable to prevent great financial loss and damage.

(f) No purpose would be served in permitting the court below to conduct extensive hearings involving the printing and study of a voluminous record if that court has no jurisdiction to entertain the proceeding.

Wherefore, petitioner respectfully prays that this petition for a writ of certiorari be granted, and that finally the decree of the lower court be reversed and petitioner's motion to dismiss for lack of jurisdiction be sustained; and for such further relief as to this Honorable Court may seem proper.

Respectfully submitted,

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J. S. VERNER.

New Orleans, Louisiana,
April 30, 1947.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 78

CHICAGO AND SOUTHERN AIR LINES, INC.,

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Respondent.

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MAY IT PLEASE THE COURT:

OPINION BELOW.

The opinion of the court below is reported in 159 F. 2d 828 (R. 407), and the decision of the Civil Aeronautics Board upon which the proceedings of the court below are based is reported in 6 CAB 857 (R. 118).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, chap. 229, Sec. 1, (28 U. S. C. 347(a), 43 Stat. 938). The decree of the lower court was rendered February 14, 1947. There was no application for rehearing, and Chicago and Southern Air Lines, Inc., sometimes referred to herein as C. & S., filed a petition for a writ of certiorari on May 6, 1947. Thereafter Civil Aeronautics Board, hereinafter referred to as the Board, filed a similar petition on May 13, 1947. Certiorari was granted to both applicants on June 16, 1947.[1] The C. & S. petition is No. 78 and the Board's petition is No. 88 on the docket of this Court.

STATEMENT OF FACTS.

In December, 1940, Waterman Airline, Inc., a subsidiary of Waterman Steamship Corporation, filed an application with the Board, under Section 401 of the Civil Aeronautics Act,[1a] for a certificate of public convenience and necessity to engage in air transportation between the United States and Puerto Rico.[2] Thereafter, Waterman Steamship Corporation, referred to herein as Waterman, was itself substituted as the applicant.[3]

Meanwhile, C. & S. filed with the Board an application seeking a certificate of public convenience and neces-

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[1] R. 414.

[1a] June 23, 1938, c. 601, Sec. 401, 52 Stat. 987; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 54 USCA 481.

[2] R. 42.

[3] R. 96.

sity to engage in air transportation between New Orleans and San Juan, (a) via Cuba, Haiti and the Dominican Republic, and (b) via Tampa, Miami, Cuba, Haiti and the Dominican Republic. C. & S. also filed applications for other routes in the Caribbean and the Central American areas.[4] The applications filed on behalf of C. & S. and of Waterman were consolidated with many others in a proceeding referred to as "Additional Service to Latin America".[5]

Before hearings were had on the applications, copies of the various applications were transmitted to the President of the United States[6] as required by Section 801 of the Act.[7] Hearings were held before examiners of the Board and briefs were filed with the examiners, who submitted their report on March 5, 1945, serving copies of the report on all parties. Exceptions and briefs were filed and all parties were allowed to present arguments before the Board from April 30 to May 5, 1945. After these arguments the Board prepared an opinion and proposed orders granting and denying certificates of public convenience and necessity, and, pursuant to Section 801 and before the publication of the opinion and proposed orders, the Board submitted them to the President for his approval. The President disapproved in part the opinion and proposed orders as submitted by the Board. The Board thereupon revised its opinion and its orders to conform with the President's directions.[8]

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[4] Cf. R. 232.
[5] Docket 525 of Civil Aeronautics Board.
[6] Cf. R. 124, the opinion of the Board.
[7] *Infra*, p. 8.
[8] Opinion of the Board, R. 125.

The changes did not apply to the applications made by Waterman or C. & S., but were directed to applications for other foreign routes which were a part of the general hearing on additional service to Latin America. There were four such changes made at the instance of the President. First, although the Board saw no necessity for the issuance of a certificate for an extended South American route, the President thought it advisable, and Braniff was, therefore, given one. Second, the Board denied the necessity of a second carrier between New York and Bermuda, but one of the members of the Board made a minority report recommending that National Airlines be given the route.[9] The President overruled the Board and it granted a second certificate, awarding it not to National, but to Eastern. Third, the Board found there was no necessity for a second carrier between Miami and San Juan, but the President thought a second certificate should be issued and one was granted Eastern Airlines. Fourth, the Board proposed to award the route between Los Angeles and Mexico City to Pan American Airlines, but the President preferred that the route be awarded Western Airlines and, accordingly, the award was made to the latter.

On May 17, 1946, the Board published its opinion which contains the modifications required by the President.[10] Included in that opinion was the decision that C. & S. be issued a certificate of public convenience and necessity for foreign and overseas air transportation of persons, property and mail "between the co-terminal points, New

[9] Opinion of the Board, R. 181.
[10] R. 118-289.

Orleans, La., and Houston, Tex., the intermediate point Havana, Cuba, and (a) beyond Havana, Cuba, the intermediate points Camaguey, Cuba, Port au Prince, Haiti, Ciudad Trujillo, Dominican Republic, and the terminal point San Juan, Puerto Rico, and (b) beyond Havana, Cuba, the intermediate points Kingston, Jamaica, Aruba, Netherlands West Indies, Curacao, Netherlands West Indies, and the terminal point Caracas, Venezuela."[11] At the same time, the Board denied the applications of Waterman and others for all or portions of the foregoing routes.[12] The Board also denied Waterman's previous motion of May 6, 1946,[13] requesting the Board to reopen the proceedings to receive further evidence and for reargument, on the proposed New Orleans-San Juan route.

On May 22, 1946, the President formally approved the decision of the Board to certificate petitioner and to deny the other applications.[14] On May 24, 1946, a copy of the Board's decision, as approved by the President, was served upon Waterman, and on the same day the certificate was issued to petitioner.

On June 24, 1946, Waterman filed a request for rehearing.[15] The rules of the Board, which were promulgated under Section 1005 of the Act,[16] provide that a petition for rehearing shall not operate as a stay of the effective date of the order sought to be modified or vacated, unless specially so ordered by the Board.[16a]

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[11] R. 206-211; R. 258; R. 269, et seq.
[12] R. 263.
[13] R. 114, et seq.
[14] R. 263.
[15] R. 291, et seq.
[16] *Infra*, pp. 12, 13.
[16a] R. 344.

No stay of the Board's opinion of May 17, 1946, was requested by Waterman and none was ordered by the Board. Moreover, on July 12, 1946, less than sixty days after the rendition and the service of the opinion of the Board, the Board denied the application for a rehearing.[17]

Thereafter, on September 6, 1946, considerably more than sixty days after the rendition and service of the Board's opinion, Waterman filed a petition in the court below, asking for a review of the foregoing action by the Board.[18]

After the expiration of sixty days, a petition may be filed in the Circuit Court of Appeals only upon leave of that court after a showing of reasonable grounds for failure to file the petition theretofore.[19] No such showing was made by Waterman and the court was not called upon and did not make such a finding in that regard.

The Board filed a motion to dismiss the petition to review for lack of jurisdiction.[20] After being granted leave by the court to intervene, C. & S. also moved to dismiss Waterman's petition to review.[21]

The motion to dismiss filed by C. & S. was predicated, in part, on the ground that the court below lacked jurisdiction to review an award, approved by the President of the United States, granting a certificate of public convenience and necessity for overseas and foreign trans-

[17] R. 328 et seq.
[18] R. 1.
[19] Cf. Section 1006(a) of the Act, *infra*, p. 7.
[20] R. 27.
[21] R. 388.

portation. The motion to dismiss was also predicated on the ground that the Waterman petition for review was not filed within the sixty-day period allowed under Section 1006 of the Act.

After hearing, the court below rendered its decision denying the motions to dismiss filed by C. & S. and the Board. In doing so, the court recognized [22] that its opinion was diametrically opposed to that of the Second Circuit Court of Appeals in *Pan American Airways Company v. Civil Aeronautics Board.*[22a] As stated, certiorari was granted by this Court.[23]

STATUTORY PROVISIONS INVOLVED.

This proceeding arises under the Civil Aeronautics Act. Sections 1006, 801, 802, 1102, and 1005, of that Act, as well as Section 6 of the Air Commerce Act of 1926, are pertinent to the issues raised. Section 1006 (a) provides:[24]

> "Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 801 of this chapter, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed with-

[22] R. 407 at 411.
[22a] 121 F. (2d) 810.
[23] R. 414.
[24] June 23, 1938, c. 601, Sec. 1006, 52 Stat. 1024; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 646.

> in sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

It is conceded that the order sought to be reviewed is not an order in respect of a "foreign air carrier" which is defined in Section 1(19) of the Act:[25]

> "'Foreign air carrier' means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in foreign air transportation."

Although C. & S. is not a "foreign air carrier", as defined by the Act, the certificate issued was a certificate subject to the approval of the President under Section 801, which provides:[26]

> "The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under Section 402, shall be subject to the approval of the President. Copies

[25] June 23, 1938, c. 601, Sec. 1(19), 52 Stat. 977; Reorg. Plan No. III, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2109, 54 Stat. 1233; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 401(19).

[26] June 23, 1938, c. 601, Sec. 801, 52 Stat. 1014; Reorg. Plan No. III, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2109, 54 Stat. 1233; 49 USCA 601.

of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof. . . ."

The certificate granted to C. & S. provides for overseas and foreign air transportation which are defined in the Act by Section 1(21)(b) and (c). Section 1 (21) provides as follows:[27]

"'Interstate air transportation', 'overseas air transportation', and 'foreign air transportation', respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

"(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District or Columbia;

"(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

[27] For complete citation see note 25.

> "(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation."

C. & S. will attempt to show that an order for foreign and overseas transportation subject to the approval of the President is not reviewable because the court may not review the action of the President in the exercise of the powers given him by the Constitution to conduct our foreign affairs and to act in the capacity of Commander-in-Chief of the armed forces. C. & S. contends that the order is the result of the combined decisions of the Board and the President and that a review thereof necessarily involves the review of the President's action. Finally, C. & S. contends that if the action of the Board can be dissociated from that of the President, the order of the Board is not final and presents no "case or controversy".

In interpreting Section 801, attention will be called to Section 802 and Section 1102 as illustrations of the statutory pattern. Section 802 provides as follows:[28]

> "The Secretary of State shall advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services
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> "

[28] June 23, 1938, c. 601, Sec. 802, 52 Stat. 1014; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 602.

Section 1102 provides as follows:[29]

> "In exercising and performing its powers and duties under this chapter, the Board shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, shall take into consideration any applicable laws and requirements of foreign countries and shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided*, That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest."

This country recognizes no freedom of the air, as will be seen in Section 6 of the Air Commerce Act of 1926, which provides:[30]

> "(a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above

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[29] June 23, 1938, c. 601, Sec. 1102, 52 Stat. 1026; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 672.

[30] May 20, 1926, c. 344, Sec. 6, 44 Stat. 572, as amended June 23, 1938, c. 601, Sec. 1107(i)(1)(3, 4, 5), 52 Stat. 1028; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 176.

all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

"(b) Foreign aircraft not a part of the armed forces of the foreign nation shall be navigated in the United States only if authorized as hereinafter in this section provided.

"(c) If a foreign nation grants a similar privilege in respect of aircraft of the United States, and/or airmen serving in connection therewith, the Civil Aeronautics Board may authorize aircraft registered under the law of the foreign nation and not a part of the armed forces thereof to be navigated in the United States. No foreign aircraft shall engage in air commerce otherwise than between any State, Territory, or possession of the United States (including the Philippine Islands) or the District of Columbia, and a foreign country."

In support of the second phase of this proceeding, dealing with the failure of Waterman to file its petition to review within the period allowed, attention is called to Section 1005 of the Civil Aeronautics Act:[31]

"Except as otherwise provided in this chapter, all orders, rules, and regulations of the Board

[31] June 23, 1938, c. 601, Sec. 1005, 52 Stat. 1023; Reorg. Plan No. IV, Sec. 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235; 49 USCA 645(a).

shall take effect within such reasonable time as the Board may prescribe, and shall continue in force until its further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation: *Provided*, That whenever the Board is of the opinion that an emergency requiring immediate action exists in respect of safety in air commerce, the Board is authorized, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other form of pleading by the interested person or persons, and with or without notice, hearing, or the making or filing of a report, to make such just and reasonable orders, rules, or regulations, as may be essential in the interest of safety in air commerce to meet such emergency: *Provided further*, That the Board shall immediately initiate proceedings relating to the matters embraced in any such order, rule, or regulation, and shall, insofar as practicable, give preference to such proceedings over all others under this chapter."

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred—

(1) In holding that it had jurisdiction to review a decision of the Civil Aeronautics Board, approved by the President, under Section 801 of the Act, granting a certificate of public convenience and necessity for overseas and foreign air transportation;

(2) In holding that Waterman's petition for review was timely filed under Section 1006 of the Act;

(3) In failing to grant the motion to dismiss filed by C. & S.

ARGUMENT.

I.

A. The problems involved in foreign air transportation are chiefly political, having to do with foreign policy and national defense.

International air transportation became a problem only following World War I. During that conflict the airplane first emerged as a competent medium of transportation, but it also emerged as a proven weapon of war. Its potential as war materiel greatly colored its acceptance as an instrument of transportation and influenced formulation of the legal concepts for the control of international air travel.[32]

The chief problem growing out of the acceptance of the airplane as an instrument of international travel was the conflict between the proposed doctrine of freedom of the air and that of air sovereignty.[33] Directly after World War I, certain authorities urged acceptance of complete freedom in air transportation, but these few voices were

[32] Journal of Air Law and Commerce, October, 1939, V. 10, p. 439.
[33] "The Future of the Airways," by Sir Frederic Handley Page, *Foreign Affairs*, V. 22, No. 3, p. 403, at 407 (1944).

soon drowned out at the Paris Conference of 1919, and the convention concluded there recognized that each nation exercised sovereign rights in the air space above its territorial waters and its actual land mass.[34]

The United States was not a party to the Paris convention,[35] but it made a legislative declaration in 1926 in Section 6 (a) of the Air Commerce Act of that year to the effect that this country had complete sovereignty over all air space superadjacent to its territory and territorial waters.[36] The barriers thus erected by the United States, as well as by all other nations against foreign aircraft, were subject to penetration only through concession or license or permit from the particular sovereign power controlling the particular air space.

The penetration of national barriers involving as it does a sacrifice or relaxation of sovereign control presents in this aspect political and military problems that ultimately have to be worked out on the diplomatic levels. It is true that in the Pacific and in South America, Pan American Airlines gained a number of private unilateral concessions by dealing directly with the governments in-

[34] Article I of the Convention stated: "The high contracting parties recognize that every power has complete and exclusive sovereignty over the airspace above its territory and territorial waters." The Paris convention resulted in the relaxation of these air barriers by the individual signatories in return for reciprocal rights to penetrate the barriers set up by other signatories, but the reciprocity was limited to the right to make innocent flights over foreign territory, not regularly scheduled flights.

[35] The United States signed the convention but the Senate did not approve it. Thirty-three nations eventually subscribed to it and it has become basic public international law. The United States later became party to the Pan-American Convention for Air Navigation adopted in Havana in 1928, which embodied the basic principles of the Paris Convention.

[36] Cf. Section 6, *supra*, pp. 11, 12.

volved, but this was possible only because our State Department at that time allowed and encouraged this method and actually used its influence to implement the negotiations.[37]

For the most part, however, the inauguration of air services by American carriers to foreign points has been the aftermath of bilateral executive agreements between the United States and the foreign nation at which the terminal point was located or over which the flight was directed.

Prior to the second World War many such bilateral agreements were signed and they were instigated, for the most part, by American carriers who desired to penetrate the airspace of another country.[38] In each instance, the

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[37] Lissitzyn, Oliver James: *International Air Transport and National Policy*, Council of Foreign Relations (1942), pp. 385, 387. Cf. also "Legal Rules for International Aviation," by Charles S. Ryne, 31 Va. L. Rev. 267, 298 (1945). In the case of Columbia, the matter was handled through regular diplomatic channels and by executive agreement. The argument advanced for the early policy in Latin America of allowing American carriers to negotiate directly for their foreign privileges was that the United States was not committed to any reciprocal obligations limiting its sovereignty in favor of foreign carriers. This procedure was possible, however, only when a minor power was concerned. "Airways for Peace," by Edward Warner, Foreign Affairs, V. 23, p. 13. As of December 1, 1943, the Civil Aeronautics Board announced the abandonment by it and the State Department of the policy of unilateral private concession. C. A. B. memorandum, dated December 2, 1943.

[38] The following bilateral agreements were concluded before the war: Columbia—February 23, 1929; The Netherlands—May 24, 1933; Italy (Executive Agreement Series 24)—October 13, 1931; Germany (Executive Agreement Series 38)—June 1, 1932; Sweden (Executive Agreement Series 47)—October 9, 1933; Norway (Executive Agreement Series 50)—November 15, 1936; Union of South Africa (Executive Agreement Series 54)—September 20, 1933; Denmark (Executive Agreement Series 58)—April 16, 1934; Great Britain (Executive Agreement Series 76)—May 5, 1935; Irish Free State (Executive Agreement Series 110)—December 4, 1937; Canada (Executive Agreement Series 129)—August 1, 1938; France (Executive Agreement Series 152)—August 15, 1939; Liberia (Executive Agreement Series 166)—June 15, 1939.

United States, while not always giving equivalent privileges to the national aircraft of the other signatory, did make concessions. Since the last war an ever increasing number of such agreements has been executed.[39] Today the agreements usually describe the routes to be flown by the respective national aircraft, and empower the contracting nations to designate their own flag line to fly the route.[39a] This is, of course, all handled through diplomatic channels by the State Department, usually with consultation and assistance from the Board,[40] which is bound under Section 1102 of the Act to act in conformity with the executive agreements.

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[39] For example, agreement with Canada, February 19, 1945 (Executive Agreement Series 457), with Ireland, February 15, 1945 (Executive Agreement Series 460), with Ireland, February 1, 1945 (Executive Agreement Series 463), with Switzerland, August 3, 1945 (Executive Agreement Series), with Norway, October 15, 1945 (Executive Agreement Series 482), with Portugal, December 6, 1945 (Executive Agreement Series), with Great Britain, February 11, 1946 (Executive Agreement Series), with France, March 27, 1946 (Executive Agreement Series), with Belgium, April 5, 1946 (Treaties and other International Acts Series), with Brazil, October 6, 1946 (Treaties and other International Acts Series), with Czechoslovakia, Jan. 3, 1946 (Treaties and other International Acts Series), with Denmark, March 21, 1946 (Treaties and other International Acts Series), with Turkey, May 25, 1946 (Treaties and other International Acts Series), with Egypt June 15, 1946 (Treaties and other International Acts Series), with Lebanon, August 11, 1946 (Treaties and other International Acts Series), with China, December 20, 1946, with India, November 14, 1946; with Australia and New Zealand, December 3, 1946; with Peru, December 27, 1946; with the Philippines, November 16, 1946; with Uruguay, December 14, 1946; with Ecuador, January 8, 1947; with Paraguay, February 28, 1947; with Siam, February 26, 1947; with Denmark, December 4, 1945; with Sweden, December 4, 1945; with Argentina, May 1, 1947; with Chile, May 10, 1947; with Syria, April 28, 1947; with Union of South Africa, May 23, 1947.

[39a] Bilateral agreements of the Bermuda model entered into within the last two years almost without exception provide for the designation of a flag line by the obligee nation.

[40] For example, the bilateral agreement concluded with France on March 27, 1946, bears the signatures of the American Ambassador to France, a representative of the State Department and the Chairman of the Civil Aeronautics Board (then Mr. Pogue). Likewise, the agreement with Brazil bears the signature of our diplomatic representative and Mr. Landis, then chairman of the Board.

In Section 6(c) of the Air Commerce Act of 1926 Congress recognized the fact that successful air penetration by United States carriers required establishment of mutually reciprocal concessions. A recent report of the Air Coordinating Committee appointed by the President emphasizes the widespread acceptance of the principle of reciprocity in international air transportation.[41]

The practical aspect of the reciprocal nature of the bargaining process is illustrated by several recent decisions of the Civil Aeronautics Board. In one recent case involving the application of a foreign carrier for service between Venezuela and the United States, intervention was made by an American airline which was already servicing the same area. In disposing of this opposition and allowing the Venezuelan carrier the permit sought, the Board said:[42]

> "In making its decision in the Latin American Air Service case to authorize the United States air carriers to operate the routes there certificated, the board naturally took account of the prospect that the air lines of other states served by our air carriers would have an opportunity on a fair reciprocal basis to operate routes in the United States . . ."

In short, the natural and probable consequence of certificating a United States carrier to engage in foreign air transportation is the obligation to reciprocate by permit-

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[41] Report of the Air Coordinating Committee, House Doc. 148, 80th Cong., 1st Sess.; 1947 US Av. R. 124, 220. See also Secretary Marshall's statement of policy on reciprocity as of June 12, 1947. 1947 US Av. R. 265.

[42] Linea Aerea Taca De Venezuela, C. A., et al., Air Carrier Permits, Docket No. 2180; 7 CAB 317, 321 et seq. (1946).

ting a foreign carrier to fly a similar or the same route. In acting on an application by a United States carrier to engage in foreign transportation, the Board and the President therefore must inevitably make a silent but implicit decision on the future application of a foreign carrier seeking reciprocal privileges. For example, should a United States carrier apply for a route to a country with whom our relations are strained, the possibilities are that the certificate would be denied because the State Department would not be able to obtain air concessions from that country or because the price of such concessions would be equivalent landing rights in the United States, a price considered too high for reasons of military security and international policy.[43]

Thus, the inexorables of reciprocity require that considerations of national defense and of international policy which are involved in a decision to grant or deny a permit[44] to a foreign carrier to fly in the United States must be taken into equal account in a decision to grant or deny a certificate to a United States carrier to fly in foreign air transportation. There is, therefore, no more reason for the review of one than the other.

In many countries the flag carrier is owned or controlled by the state and operated, not as a profit-making

[43] A rapprochement between nations is usually sealed with an air transport agreement testifying to the absence of ostensible military and political suspicions. Thus, Germany was barred for several years after World War I from signing the Paris Convention. The Locarno Pact was followed by the Franco-German air transport accord and the Polish-German rapprochement of 1934 was accompanied by an air agreement. The instances are numerous. Cf. Lissitzyn, *op. cit. supra*, p. 398 et seq.

[44] United States carriers receive certificates; foreign carriers, permits.

enterprise, but as an instrument of that nation's foreign policy or propaganda.[45] German foreign air transport, for example, extended itself into South America with the obvious desire of political and ideological infiltration. In the Pacific Japanese civil airlines were used to hold together politically a widely diverse and farflung empire.[46] In the United States extension of services by United States carriers in Latin America has been encouraged to reinforce our Good Neighbor policy and solidify hemisphere defense. Mail subsidies are granted to United States carriers to stimulate air services and underwrite aeronautical developments and establishment of regular and familiar routes useful in the event of war. Thus, choice of an American flagline and its route contemplates the choice of an effective vehicle of positive as opposed to negative foreign policy.

As has been demonstrated, mere certification of a carrier is not enough. Landing rights must be obtained before service can be instituted. Landing rights can be obtained today only through the intervention of the President or his *alter ego*, the State Department, who is alone in a legal position to negotiate with foreign governments.[47]

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[45] "The Diplomacy of Air Transport," by Oliver F. Lissitzyn, *Foreign Affairs*, V. 19, No. 1, pp. 156, 161 *et seq.* (1940); and "Wings for the Trojan Horse," by Melvin Hall and Walter Peck, *Foreign Affairs*, V. 19, No. 2, p. 347 (1941).

[46] "Air Transport and World Organization," by John C. Cooper, Yale Law Journal, V. 55, p. 1191 at 1192 (1946).

[47] This has been clearly established since the Genet incident during Jefferson's administration when the President replied to Genet's request for an exequatur for a consul whose commission was addressed to "the Congress of the United States" that, "as the President is the only channel of communication between the United States and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation . . ." *Writings of Thomas Jefferson* (Mem. ed.), IX, 256, cited in Corwin, Edward S.: *The President: Office and*

The State Department is, accordingly, placed in the position of actively sponsoring the institution by a particular United States carrier of a foreign service. The carrier receives official sanction. It is the carrier designate of this nation. It becomes particularly important, therefore, that the carrier should be acceptable to the President, or the State Department, and to the government of the foreign state.

B. The authority of the President in this field existed prior to the Act and emanates from the Constitution.

In the enactment of Section 801 Congress invoked the constitutional functions of the President. It did not delegate to him its legislative powers in the control of foreign commerce.[48] As shall be shown the President had exercised authority in the selection of foreign route patterns, carriers, etc., before passage of the Act in 1938, and Congress needed only to recognize these powers and to set up the machinery for their effective coordination with the work of the Board.[49]

The authority of the President in regulating international air transportation came, not from Congress, but

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Powers, New York University Press (2d ed. rev.), p. 209, note 28, p. 402. Congress recognized the President's prerogative in the Logan Act. 18 USC Sec. 5. Cf. Corwin, *op. cit. supra*, 208 et seq.; Willoughby on the *Constitution of the United States*, (2d ed.), V. 1, pp. 537 et seq.; Chief Justice Marshall described the President as "the sole organ of the nation in its external relations."

[48] John Bassett Moore pointed out that since Congress "possesses no power whatever to make international agreements, it has no such power to delegate." 60 Proc. Am. Phil. Soc. XV-XVI, 1921.

[49] See the opinion of Attorney General Tom C. Clark rendered June 18, 1946, advising the Secretary of State that the bilateral transport agreements were valid and not in conflict with the Act. 1946 US Av. R. 412 et seq. In that opinion the writer said: "The ultimate decision, of course, under section 801, must be made by the President."

from those phrases of the Constitution (1) recognizing him as Commander-in-Chief,[50] (2) empowering him to receive ambassadors and public ministers,[51] (3) depositing in him the power of the Executive,[52] and (4) authorizing him to negotiate treaties.[53]

There is a strong analogy between the matters under discussion and the experience of the President with regard to the landing of submarine cables. Occasional special acts of Congress authorized the early trans-Atlantic cables,[54] but in the absence of express statutory authorization, the President after 1869 [55] exercised his constitutional power as Chief Executive in charge of our foreign affairs to grant or refuse permits for the landing of cables and to insert conditions in such permits.[56]

Prior to the Civil Aeronautics Act of 1938 the President, through the State Department, had concluded bilateral executive agreements with Columbia, with the Netherlands, with Germany, with Sweden, with Norway, with the Union of South Africa, with Denmark, with Great Britain and with the Irish Free State.[57] By these agree-

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[50] Constitution, Art. II, Section 2, Parag. 1.
[51] Constitution, Art. II, Section 2, Parag. 2.
[52] Constitution, Art. II, Section 1, Parag. 1.
[53] Constitution, Art. II, Section 2, Parag. 2. For a discussion at length on the broad powers assumed by the President on the basis of the four clauses cited see Corwin: *The President's Control of Foreign Affairs*, Princeton University Press, 1917; Corwin, *The President: Office and Powers*, Chapters III, IV, V, and VI; and "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," by Myres S. McDougal and Asher Lans, 54 Yale Law Journal 181 at 246 et seq. (1945).
[54] See Act of March 3, 1857 (11 Stat. 1872). The special acts are collected in Cable-Landing Licenses, Hearings on, S. 4301, 66th Cong., 3d Sess., 1921, 250-252.
[55] President Grant established the precedent. See Corwin, The President, *op. cit. supra*, p. 244.
[56] Lissitzyn, *op. cit. supra*, pp. 31 et seq.
[57] See note 38.

ments the President obligated this county to permit regular transport flights and landing privileges to carriers of the other contracting parties in exchange for similar concessions to United States carriers. Most of the executive agreements provided that the foreign flag line, applying for a permit under a bilateral agreement, would apply through *diplomatic channels*.[58] Thus, the granting of permits to foreign carriers and the general designation of commercial routes for United States carriers were, even prior to 1938, matters determined by the President and the State Department without congressional grant.[59]

The activities of the Board in the field of international air transportation had to be channelled through and limited by the President and the State Department because the Board could not assume the prerogative of the Executive to conduct our foreign affairs, nor could it assume his obligations as Commander-in-Chief charged with the duty to provide for national security. As a matter of fact, Section 802 of the bill introduced in Congress originally provided that the Secretary of State should initiate and conduct negotiations and conclude such agreements as would be satisfactory to the Authority (now called the Board) and the President. This draft of Section 802 was discarded because the power to engage in diplomatic negotiations was already vested in the President under the Constitution and there was some question whether the proposed provision constituted a limitation on that power by subjecting it to the approval of the

[58] Lissitzyn, *op cit. supra*, pp. 377 and 386.

[59] In 1935 the agreement with Great Britain went so far as to name specifically the Imperial Airways as the British carrier. The CAB later gave effect to this nomination through diplomatic exchange. CAB orders, Serial No. 625, July 29, 1940, 2 CAB 181.

Authority.[60] Instead, Congress carefully avoided any intrusion into the Executive power by directing the Board to act consistently with the President. Sections 801, 802 and 1102.

Congress was concerned with the military significance of foreign air transportation and it was well aware of the fact that the Board did not have access to secret military and diplomatic information nor the means of coordinating military with diplomatic information. The President, as Commander-in-Chief and as Executive in charge of foreign affairs, is alone in that rare position.

Thus, the then Senator Truman, commenting on the President's power under Section 801 of the bill, said,[61] "This check is required by the very delicate questions of national defense which are involved."

Testifying before the House Committee on Interstate and Foreign Commerce, Clinton M. Hester had this to say of Section 801:[62]

> "Take for instance, this situation with reference to the provision that the President shall have authority to approve certificates of public convenience and necessity for American flag airplanes flying abroad . . . In flying to foreign countries, from a national defense and international relations standpoint, it is very important that the President, the War Department, and the Navy Department, as well as the State Department, have

[60] See the debates on Section 802. 75th Cong., 3d Sess., pp. 6853, 6854 (1938).
[61] 75th Cong., 3d Sess., p. 672, May 12, 1938.
[62] Hearings on H. R. 9738, 75th Cong., 3d Sess., pp. 147-148.

something to say about where air bases will be established in foreign countries."

It is not to be denied that the establishment of airlines in foreign countries presents economic as well as political considerations. Congress apparently recognized this fact in drafting the Act. To the Board Congress delegated its power to regulate foreign commerce, setting up certain standards for the Board to follow in selecting the proper carriers to bear the United States flag in foreign transportation. But Congress likewise recognized that foreign air travel involves political considerations which were already within the province of the President under his constitutional powers as Chief Executive in charge of foreign affairs. Section 801 of the Act is not only a recognition of the President's power as the Chief Executive in charge of our foreign affairs, but, a recognition as well of the fact that in case of conflict between the economic and the political considerations, the political ends must first be served. Thus, where in the opinion of the Board a particular carrier may from the standpoint of economic factors be the desirable applicant for a particular foreign and overseas route, if the President feels that political considerations require the denial of that carrier's application, or the certification of another, the President's choice must prevail.

Often there is an overlapping of the authority given by the Constitution to Congress to regulate foreign commerce and legislate in the foreign field and the authority given to the President to conduct foreign relations.[63] In

[63] See Corwin, The President, *op cit. supra*, Chap. VI.

such instances, Congress may entrust to the President, who already has "cognate" powers, complete discretion covering the entire field. *United States v. Curtiss-Wright Export Corporation.*[64] That is precisely what Congress did in the enactment of Section 801 of the Civil Aeronautics Act.

If Congress had made no provision for the President's control over foreign air transportation and had not included Sections 801, 802 and 1102 in the Act, there would be presented the necessity of reconciling the "logical incompatibles" as Professor Corwin has described them[65]—the unlimited power of the President and the plenary power of Congress in foreign relations.[66] But Congress did recognize the President's power in this Act, as Sections 801, 802 and 1102 bear witness.[67] Having thus entrusted the President with complete discretion in the field of foreign air transportation, Congress did not and could not have intended to direct the Judiciary, which is the one branch of government given no responsibility in the field of foreign relations, to interfere with the President in the exercise of his complete authority in that field.[67a]

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[64] 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255 (1936).

[65] Corwin, The President, *op. cit. supra*, p. 222.

[66] By the Appropriation Act of 1913 the Congress attempted to forbid the President the right to participate in an international conference without authorization, but the attempt was unsuccessful. Likewise, in the Merchant Marine Act of 1920 the Congress "authorized and directed" President Wilson to terminate portions of certain treaties. President Wilson flatly refused on the ground that Congress did not have the constitutional power to direct him.

[67] "It can scarcely be denied that the President needs no new powers beyond those expressly granted to him in the document (the Constitution) to enable him to conduct negotiations with other governments and that he has exclusive power to conduct such negotiations." "Treaties and Congressional-Executive or Presidential Agreements," supra, 54 Yale Law Journal 222.

[67a] Prof. Corwin says that the struggle for power between Congress and the President in external affairs presents a political question and "the Court refrains from thrusting its oar into the troubled waters." Corwin, The President, *op. cit. supra*, p. 252.

C. The Action of the President is not Subject to Judicial Restraint.

An analysis of Section 801 must reveal that it was not enacted to provide an intermediate review of the Board's findings. Had Congress intended to provide another step in the review of the Board's action, it would not have confined this review to foreign and overseas air transportation. Moreover, Congress would not have burdened the President of the United States with a judicial function.

Clearly Congress intended that the President act in his executive capacity when approving or disapproving the issuance of certificates or permits for foreign air transportation. Of necessity the President is not limited in his action by the evidence and information contained in the record before the Board. He may base his decision on matters outside the record such as military and diplomatic information of a confidential and secret nature. The basis of the President's action is, therefore, not a matter of record and in the absence of such a record, his decision cannot possibly be susceptible of review.[68]

A similar interpretation of a similar statute was made by the Court in *United States v. George S. Bush & Co.*[69] In that case the authority of the President to increase duties on imported products to equalize their costs with that of domestic products, was held to be final and not subject to judicial review. There, the authority

[68] United States v. Curtiss-Wright Corp., *supra;* United States v. Bush & Co., 310 U. S. 371, 60 S. Ct. 944, 84 L. ed. 1259 (1940).
[69] United States v. Bush, ibid.

to the President was legislative only. The statute under consideration was the Tariff Act, which was enacted under the power of Congress to regulate foreign commerce. Congress had provided that a commission should hold hearings on the readjustment of duties and submit its findings to the President, and the President was then empowered to issue a proclamation approving the rates of duties and changes in classification specified in any report of the Commission if in his judgment such rates and changes were shown by such investigation to be necessary to equalize the difference in the cost of production of the domestic and foreign article. The Court said:[70]

> "For the judiciary to probe the reasoning which underlies the proclamation would amount to a clear invasion of the legislative and executive domain."

The instant case presents a much stronger ground for judicial abstention. Here the President is acting, not under administrative authority granted by Congress in the exercise of its power over foreign commerce, but under his own constitutional authority as the executive in charge of our foreign and diplomatic affairs on the political level.

The rule is well recognized that the judiciary will not review action of the political branches of the government. This rule grows technically from the doctrine of separation of powers and practically out of political exigency. The original premise was stated by Chief Justice Marshall in *Marbury v. Madison*:[71]

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[70] Ibid.
[71] 1 Cranch 137, 2 L. ed. 60 (1803).

> "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience . . . Whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."

That the conduct of our foreign relations is a political matter within the control of the executive is clearly established by the decisions of this Court.[72] Thus, in *Oetjen v. Central Leather Company*, the Court said:[73]

> "The conduct of the foreign relations of our Government is committed by the Constitution to the executive and legislative—'the political'—departments of the government and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision . . ."

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[72] Dakota Cent. Telephone Co. v. State of South Dakota, 250 US 163, 39 S. Ct. 507, 63 L. ed. 910 (1919); Fok Young Yo v. United States, 185 US 296, 22 S. Ct. 686, 46 L. ed. 917 (1902); Doe, ex dem. Clark, et al. v. Braden, 16 How. 635, 14 L. ed. 1090 (1853); United States v. Palmer, 3 Wheat. 610, 4 L. ed. 471 (1818); Foster and Elam v. Neilson, 2 Pet. 253, 7 L. ed. 415 (1829); Jones v. United States, 137 US 202, 11 S. Ct. 80, 34 L. ed. 691 (1890); Underhill v. Hernandez, 168 US 250, 18 S. Ct. 83, 42 L. ed. 456 (1897); Guaranty Trust Co. of N. Y. v. United States, 304 US 126, 58 S. Ct. 785, 82 L. ed. 1224 (1938); Kiyoshi Hirabayashi v. United States, 320 US 81, 63 S. Ct. 1375, 87 L. ed. 1774 (1943); State of Russia v. National City Bank of N. Y., 69 F2d (CCA 2-1934) 44.

[73] Oetjen v. Central Leather Co., 246 US 297, 38 S. Ct. 309, 62 L. ed. 726 (1918).

In *United States v. Curtiss-Wright Export Corporation, supra*, there was an attack upon a joint resolution of Congress authorizing the President to declare an embargo on the export of arms and munitions to the belligerents in the Grand Chaco dispute if in his judgment the embargo would promote peace. Curtiss-Wright, convicted of a violation of the embargo proclaimed by the President, attacked the resolution as an invalid delegation of legislative power since it set up no adequate standard to guide the President in his decision to proclaim the embargo. The Court affirmed the conviction, saying that the President's power in the field of international relations derived from his position as Executive exercising the sovereign functions of a state in its external relations, and indicated that the President could have prohibited the export of arms and munitions to the Chaco even in the absence of the joint resolution. It said:[74]

> "Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of

[74] United States v. Curtiss-Wright Export Corp., *supra*. See also United States v. Belmont, 301 U. S. 324, 57 S. Ct. 758, 81 L. ed. 1134; United States v. Pink, 315 US 203, 62 S. Ct. 552, 86 L. ed. 796 (1942).

March 7, 1800, in the House of Representatives, 'The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations'. Annals, 6th Cong. Col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things as follows:

"'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.' 8 U. S. Sen. Reports, Comm. on Foreign Relations, p. 24.

"It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its

exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. . . ."

In the instant case we too are dealing with "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."

As in the cited case, the President's action here is not subject to judicial review.[74a]

D. Review of the order involving foreign and overseas air transportation necessarily involves review of the President's action.

Waterman takes the position that the Court is asked to review the order of the Board, not the President. C. & S. has attempted to show that the order granting a certificate for foreign and overseas air transportation is actually the order of the President, and that the Board acts merely in an advisory capacity.[75]

The court below conceded that the President's action was not subject to review and that it was not necessary for him to state reasons for his decision.[76] It assumed, however, that the conclusions of the Board could be independent of the President's action and that the decision of the Board in its pristine state could be reviewed before the President took action upon it.

The court below erred in assuming that the decision of the Board could be dissociated as an entity from that of the President. The machinery of Section 801 makes this

[74a] See also the authorities showing the inability of the court to enjoin the President. Z & F Assets Realization Corp. v. Hull, 311 US 470, 61 S. Ct. 351, 85 L. ed. 288 (1941); Mississipoi v. Johnson, 4 Wall. 475, 18 L. ed. 437 (1866); Durand et al. v. Hollins, 8 Fed. Cas. #4186 (1860). Waterman is attempting here to obtain an order enjoining the issuance and the enforcement of the certificate issued C. & S. by Presidential action.

[75] This view is expressed by Attorney General Tom Clark, when he says: "The ultimate decision, of course, under Section 801, must be made by the President." Opinion to Secretary of State, June 18, 1946, 1946 US Av. R. 412, 414. See also, Cooper, John C: *The Right to Fly*, Henry Holt & Co., 1947; p. 188, to the same effect.

[76] R. 411.

a legal and a practical impossibility. That Section requires that copies of all applications for foreign and overseas transportation be submitted to the President before hearing thereon, and prohibits the Board from publishing decisions thereon until after they have been submitted to the President for his approval. The decision thus published, therefore, is not the Board's pure self-generating strain but the product of collaboration between the Board and the President.

In the case of Additional Service to Latin America, for example, the action of the President brought about four changes in the Board's decision, as has been pointed out.[77] For example, the Board recommended that Pan American be given a route between Los Angeles and Mexico City. According to the statement contained in the Board's opinion, the President considered it advisable to award this route to Western Airlines.[78] There was no public explanation of the President's action. Since Section 801 requires that the decisions of the Board be communicated to the President before publication, the decision of the Board to award the route to Pan American was made known to the President before the order granting the route was awarded. The President demanded the change, and accordingly, when the decision of the Board was pub-

[77] In connection with these changes the Board's opinion contains the following statement: ". . . Pursuant to that section [801], the Board submitted its opinion and order and certificates in the present proceeding to the President of the United States. The President, acting in accordance with his statutory authority under Section 801 of the Civil Aeronautics Act has advised the Board that because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require the following changes in the Board's opinion: . . ." R. 125.

[78] R. 125, 170, 171.

lished and the order rendered, the route was awarded to Western Airlines. Assuming that Pan American wished to contest the award, it would clearly be asking for a review of the President's and not the Board's decision since the Board's recommendation was in Pan American's favor.

How much of the final decision is the decision of the Board and how much that of the President is impossible to determine. It is impossible to know whether the choice of C. & S. was primarily dictated by the Board, which took into account economic considerations, or by the President, who took into account political considerations, or, as must be generally the case, the result of mutual discussion and the weighing of the combined factors. Under such circumstances, the action of the Board cannot be dissociated from that of the President, and the review of one necessarily entails the review of the other.

Pertinent here is the application to this case of the Bermuda agreement entered into between the United States, acting through our State Department, and Great Britain, in February 1946. A segment of the route here under discussion was outlined in the agreement as a route to be served by a United States air carrier.[79] The United States was to designate the specific carrier to serve this route. Accordingly, the British government has been notified that C. & S. is the United States carrier designated for this route under the Bermuda Agreement.

[79] Route 11, Part B of Annex No. 3 provides that a 'United States carrier shall serve a route between New Orleans and Houston and points in Cuba, Jamaica, Aruba, and South America. 1946 US Av. R. 108, 120.

Assuming that the court below has the power to review the decision awarding the certificate to C. & S., there is doubt that the Board alone on remand or the court on review could require the issuance of the certificate to a carrier other than C. & S. in view of Section 1102, which requires that the Board act consistently with any agreement in force between the United States and any foreign country.

E. Review of the Board's decision presents no case or controversy.

Assuming that the action of the Board can be dissociated from the decision of the President, the so-called order of the Board would not be subject to review because the action of the Board is not final and, therefore, presents no case or controversy.

The action on an application for foreign air transportation is not complete in the sense that a certificate may issue before the President has acted. Review of any steps leading up to the President's action, whether it be review of an examiner's report or of the Board's recommendations, would merely result in an advisory opinion.

Article III, Sec. 2 of the Constitution extends the judicial power only to "cases" and "controversies". The Court is a constitutional court possessing only judicial powers.[80] Its function is restricted to adjudication of final decisions

[80] Ex parte Bakelite Corp., 279 US 438, 49 S. Ct. 411, 73 L. ed. 789 (1929); O'Donoghue v. United States, 289 US 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933); Old Colony Trust Co. v. Comm'r, 279 US 716, 49 S. Ct. 499, 73 L. ed. 918 (1929).

in controverted matters. It does not have the power to render advisory opinions.[81]

The logic behind this judicial abstention is carefully set forth in one of the last opinions of Chief Justice Taney in *Gordon v. United States*. The question was whether the Court had power to review a decision of the Court of Claims under the Court of Claims Act. Sec. 14 of that act provided that no money should be paid out of the Treasury for any claims allowed by the Court of Claims until the Secretary of the Treasury should have approved the payment and Congress should have made an appropriation for it. Thus the Court of Claims had no power to enforce its judgments. The Secretary of the Treasury and Congress had to approve its findings, the same as the President here has to approve the decisions of the Board on foreign and overseas certificates.

The Gordon case was argued twice and Chief Justice Taney died between the two hearings. Before his death, he had written an opinion on the first argument. The official and final opinion[82] of the court was delivered by the then Chief Justice Chase, but reference was made to Chief Justice Taney's reasoning and his opinion was reprinted in full in the Appendix of a later volume of re-

[81] Hayburn's Case, 2 Dall. 409, 1 L. ed. 436 (1792); Ferreira's Case, 13 How. 40, 14 L. ed. 42 (1851); Gordon v. United States, 2 Wall. 561, 17 L. ed. 921 (1865) and 117 US 697, appendix; In re Sanborn, 148 US 222, 13 S. Ct. 577, 37 L. ed. 429 (1893); Muskrat v. United States, 219 US 346, 31 S. Ct. 250, 55 L. ed. 246 (1911); Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission, 215 US 216, 30 S. Ct. 86, 54 L. ed. 164 (1909); United States v. Jefferson Electric Mfg. Co., 291 US 386, 54 S. Ct. 443, 78 L. ed. 859 (1934); District of Columbia v. Eslin, 183 US 62, 22 S. Ct. 17, 46 L. ed. 85 (1901). See also. "Advisory Opinions," Encyclopedia of Social Sciences, V. 1, pp. 475, 478.

[82] 2 Wall. 561, 17 L. ed. 921 (1865).

ports.[83] As pointed out there the Court cannot express an opinion "where its judgment would not be final and conclusive upon the rights of the parties[84] . . . The power conferred on this court is exclusively judicial, and it cannot be required or authorized to exercise any other."[85]

The *Gordon* case is factually similar to two earlier cases, *Ferreira's* case[86] and *Hayburn's* case,[87] both of which involved statutes by the provisions of which the action of the court was subject to acceptance by an administrative official. In both cases, the Court refused to exercise its judicial powers. The same position has been taken in numerous cases following the *Gordon* case.[88]

Federal Power Commission v. Pacific Power & Light Company[89] is relied on by Waterman in opposing the contention that no case or controversy is presented. Waterman's reply presupposes that the "case or controversy" question goes off on the right of the *court* to enforce its decision. If this were the only test, then clearly the court below was correct in pointing out that,[90] "Courts try criminal cases notwithstanding an executive pardon may frustrate a conviction. They constantly reach conclusions in all kinds of cases undeterred by the chance that a higher court may disapprove their orders."

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[83] 117 US 697, appendix.
[84] Ibid, p. 702.
[85] Ibid, p. 699.
[86] 13 How. 40, 14 L. ed. 42 (1851).
[87] 2 Dall. 409, 1 L. ed. 436 (1792).
[88] In re Sanborn, 148 US 222, 13 S. Ct. 577, 37 L. ed. 429 (1893); cf. United States v. Jefferson Electric Mfg. Co., 291 US 386, 54 S. Ct. 443, 78 L. ed. 859 (1934). See also note 81, *supra*.
[89] 307 US 156, 59 S. Ct. 766, 83 L. ed. 1180 (1939).
[90] R. 412.

But, it is submitted that the test for the determination of the existence of a case or controversy is not whether the decision or the action the court is asked to review is enforcible by the reviewing court itself, but whether it is enforcible in its then existing form by any court, agency, body or tribunal. In other words, the matter, when presented to the court, must have matured into finality, even though the finality be relative and subject to conditions subsequent such as judicial review, executive pardon and the like.

Thus, in the *Federal Power Commission* case, the Commission had definitely announced that it would not grant permission for the merger sought by the plaintiffs. If no review had been taken from that order it would have been final and conclusive under the statute controlling the case. Likewise, when a criminal court renders a judgment condemning a defendant, that judgment is final and exigible at that stage, and if no appeal is taken and no pardon granted, it will be executed.

Here, the Board does not have the power under the statute to render a decision which is independently virile and conclusive. No certificate can issue without supplementary action by the President. His action is a condition precedent to the finality of the order. It is not elective; it is mandatory.

The decision of the Board alone does not present a case or controversy because it is not a final decision in the sense that the Board's action alone is not a complete action which could lead to an enforcible result.

F. Section 1006 (a) must be interpreted to preclude review of orders for foreign and overseas transportation.

In interpreting Section 1006(a), attention is called to the original draft of that section, which read:

> "Any order, affirmative or negative, issued by the Authority under this Act except an order in respect of foreign air transportation approved by the President as provided in Section 801 of this Act, shall be subject to review . . ."

This draft was discarded and the section as adopted is as follows:

> "Any order . . . except an order in respect of ~~any foreign air transportation approved by the President~~ carrier subject to approval by the as provided in Section 801 . . ., shall be subject to review . . ."

From a comparison of this original draft with that which was finally passed, the court below concluded that it was the deliberate intention of Congress that certificates of foreign and overseas air transportation be omitted from the exception contained in Section 1006(a). C. & S. submits that this conclusion does not inevitably follow.

There was an obvious defect in the first draft of the section. The exception only extended to orders "approved" by the President. This meant that the orders of the Board under Section 801 could be reviewed before they were presented to the President or that if the President disapproved of an order of the Board, the Board's

order would be subject to review. For reasons that need no repetition here, neither of these two results was intended by Congress. It is, therefore, reasonable to conclude that Congress recognized the deficiencies in the original draft and, in an attempt to correct them, became enmeshed in a grammatical construction that produced still another defect which escaped congressional notice. The real reason [91] for the change in the provision is not determinative here.

Although section 1006(a) attempts to confer jurisdiction upon the court to review "any order" of the Board, the phrase "any order" must not be taken literally. The courts will certainly not review orders of the Board promulgating rules of practice in its hearings except as those rules may be incident to other matters before the Board, nor is it contemplated that the courts will review interlocutory orders.[92] Accordingly, it appears that orders involving foreign air carriers are not the only orders exempt from review.

Since the exception in 1006(a) is not exclusive it would not do violence to the provision to extend the exception

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[91] "Successive drafts of a statute are not stages in its development. They are separate things of which we can only say that they follow each other in a definite sequence and that one was not the other. But that fact gives us little information about the final form, since we really never know why one gave way to any other. There are doubtless many reasons, some of them likely enough to be personal, arbitrary and capricious—the fondness of the craftsman for a special locution, his repugnance to another, a misconception of the association of some word, a chance combination and often enough a mere inadvertence." "Statutory Interpretation"; by Max Radin, 43 Harvard Law Review, 863, 873 (1930).

[92] Federal Power Commission v. Metropolitan Edison Co., 304 US 375, 58 S. Ct. 963, 82 L. ed. 1408 (1938); Mallory Coal Co. v. Coal Commission, 99 F2d (CCA. DC-1938) 399.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 1340 and 1371.

CHICAGO & SOUTHERN AIR LINES, INC.,

and

CIVIL AERONAUTICS BOARD, *Petitioners*,

v.

WATERMAN STEAMSHIP CORPORATION, *Respondent*.

On Petitions for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the court below is reported in 159 F. 2d 828 (R. 407). The opinion of the Civil Aeronautics Board which is the subject of this appeal is reported in 6 C.A.B. 857 (R. 118).

QUESTION PRESENTED.

Whether the petitions present substantial questions of general importance that should be settled by this court. Both petitioners present the question of whether an order

to orders subject to the President's approval. It is a settled rule of construction that a statute must be construed so as to give effect to its purpose and intent regardless of the language employed.[93] Equally pertinent is the rule that an unconstitutional interpretation of a statute will be avoided.[94] These rules preclude a literal construction here.

If given a literal reading, Section 1006(a) would allow a review of all orders except those relating to foreign air carriers. As has been demonstrated such an interpretation would place the courts in the position of reviewing the President in the exercise of his constitutional powers and of entertaining matters not in "case or controversy". It must be assumed that Congress did not pass an unconstitutional provision and that Section 1006(a) is susceptible of other interpretation.[95]

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[93] Markham, et al. v. Cabell, 326 US 404, 66 S. Ct. 193, 90 L. ed. 165 (1945); United States v. N. E. Rosenblum Truck Lines, 315 US 50, 62 S. Ct. 445, 86 L. ed. 671 (1942); United States v. American Trucking Associations, 310 US 534, 60 S. Ct. 1059, 84 L. ed. 1345 (1940).

[94] United States v. Jin Fuey Moy, 241 US 394, 36 S. Ct. 658, 60 L. ed. 1061 (1916).

[95] The position taken by C. & S. is supported by Pan-American Airways v. Civil Aeronautics Board, 121 F2d (CCA 2-1941) 810, and Pacific Overseas Airlines Corp. v. Civil Aeronautics Board, 161 F2d (CCA DC-1946) 633, to which the court below did not adhere. In the Pan-American case the court said:

"It seems clear that in approving or disapproving of certificates of public convenience and necessity the President must frequently act on information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted the certificates. There is nothing in the Act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, not the Board, the ultimate arbiter. United States vs. George S. Bush & Company, 310 U. S. 371, 60 S. Ct. 944, 84 L. ed. 1259.

"If the President has approved of a certificate authorizing a carrier to engage in foreign air transportation and we should attempt to review the order authorizing the issuance of the certifi-

II.

WATERMAN HAS LOST ANY RIGHT TO REVIEW BY TARDY APPLICATION.

The Rules of the Board provide:[96]

> "No petition for rehearing, reargument, or reconsideration filed in accordance with this Section, or the granting thereof, shall operate as a stay of the effective date of the final order sought to be modified or vacated by such petition, unless specifically so ordered by the Board."

The reason for the rule is plain. Certificates of public convenience and necessity are awarded to fill special needs. In a great many instances, the need is a matter of emergency.[97] It is, therefore advisable, if not imperative, that the legal delays requisite to due process be cut to a minimum to assure the public the earliest possible

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cate; we would be placed in a position where we might be obliged to reverse a tribunal whose subsequent action the President would decline to approve. His sweeping powers are illustrated by the fact that under Section 801 he is obliged not only to approve or disapprove of a certificate for foreign air transportation, but even to approve or disapprove of the denial of such a certificate by the Board. It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. United States v. Belmont, 301 U. S. 324, 57 S. Ct. 758, 81 L. ed. 1134; United States v. Curtiss Wright Corp., 299 U. S. 304, 57 S. Ct. 216, 81 L. ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in the Executive discretion that it cannot be regarded as authorized by Section 1006(a) . . ."

[96] See R. 344.

[97] Plaintiff has, in a later proceeding before the Board, alleged that an emergency exists in this particular case by reason of the critical need for a scheduled air service from Puerto Rico to the United States.

service. It is conceivable that the inauguration of service might be endlessly postponed by the dilatory tactics of an opponent to an award.[98] To avoid that sort of thing the Board enacted the above regulation.

The Board had the power to make such rules under Section 1005 of the Act.[99] Petitioner had no vested right to a rehearing. The Court has said:[100]

> "Rehearings and new trials are not essential to due process of law, either in judicial or in administrative proceedings."

In *United States v. Abilene & S. R. R. Co.*,[101] the Court had occasion to interpret Section 16(a) of the Interstate Commerce Act which is analogous to the regulations provided here by the Board. Section 16(a) provided (and the section, of course, was a congressional fiat rather than an administrative one) that an order of the Interstate Commerce Commission would not be stayed pending application for rehearing unless the Commission itself stayed the action. The Court recognized that Congress had the power to enact such provision and that in the absence of a special stay by the Commission, an application for rehearing would not suspend the running of time within which a litigant had to apply for review of an order of the Commission.

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[98] Here Waterman had already filed a motion to reopen and reconsider the case after the Examiner's report had been filed. This motion was denied on May 17, 1946. Waterman then filed and application for rehearing based on similar grounds.

[99] *Supra*, pp. 12 & 13.

[100] P. C. C. and St. L. R. Co. v. Backus, 154 US 421, 14 S. Ct. 1114, 1117, 38 L. ed. 1031 (1894).

[101] 265 US 274, 44 S. Ct. 565, 68 L. ed. 1016 (1924).

It follows from that decision that if Congress could provide that an application for rehearing would not stay the action of the Commission without a special order of that body, then Congress could delegate that same power to the Board here. For actually, if the Commission is left with the discretion as to whether or not a particular order should be stayed, then the Board is acting within its proper province when it makes a regulation to the same effect in the absence of a prohibition by Congress. Especially is this true since Congress has given the Board general powers to make rules under Section 1005 of the Act.

Since the regulations are valid, Waterman was bound by them. Moreover, the order denying Waterman's application and granting a certificate to the C. & S. was served on Waterman May 24, 1946. No special order was rendered by the Board tolling the delay following the rendition of the order and the service on Waterman. In fact, no application was made by Waterman for such an order. The petition for review was filed in the court below on September 6, 1946, clearly beyond the sixty-day statutory period. No application for leave to file after that date was made; no leave was granted.

Waterman cites *Braniff v. Civil Aeronautics Board* [102] in support of its contention that its petition for rehearing tolled the running of the sixty-day period. It is respectfully submitted that the *Braniff* decision is incorrect. It is in conflict with the holding of this Court in *Levers*

[102] 147 F2d (CCA DC-1945) 152.

v. Anderson[103] and *U. S. v. Abilene and SS Railroad Company.*[104] Moreover, the case of *Southland Industries v. Federal Communications Commission*[105] cited to support the conclusion of the court in the *Braniff* case, does not do so. The *Southland* case involved the right of an unsuccessful litigant before the Federal Communications Commission to file a petition for review while a petition for rehearing was still pending before the Commission. The court decided that the Commission had not relinquished jurisdiction in view of the specific provisions of Section 405 of the Communications Act, and its legislative history. The court was careful to point out that the result would have been different had the review been from the Court of Claims, for there special regulations governing the effect of applications for rehearing would govern. Similarly, the rules of the Board here, expressly applicable to the situation here, would control and have the same force as the special rules of any tribunal, administrative or judicial.

As a matter of fact, Waterman's petition for rehearing was denied on July 12, 1946, within time for Waterman to have filed a petition for review within sixty days from May 24, 1946, the date Waterman was served with the order under attack here.

It is submitted that Waterman had sixty days from May 24, 1946, within which to apply for a petition for review. Waterman failed to apply within the sixty-day period, failed to make any showing why the sixty-day period

[103] 326 US 219, 66 S. Ct. 72, 90 L. ed. 26 (1945).
[104] Supra, note 101.
[105] 99 F2d (CCA DC-1938) 117.

should be extended, and failed to apply for or obtain special leave of court to file its petition of review after the sixty-day period had elapsed. This petition for review, therefore, is tardy and should be dismissed.

CONCLUSION.

It is respectfully submitted that the judgment below should be reversed and Waterman's petition for review dismissed.

Respectfully submitted,

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FILE COPY

JUN 5 1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. ~~1340~~ and ~~1371.~~ 78 88

CHICAGO & SOUTHERN AIR LINES, INC.,

and

CIVIL AERONAUTICS BOARD, *Petitioners,*

v.

WATERMAN STEAMSHIP CORPORATION, *Respondent.*

On Petitions for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI.

BON GEASLIN,
FRANCIS H. INGE,
JOSEPH M. PAUL, JR.,
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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issued by the Civil Aeronautics Board and approved by the President of the United States pursuant to the provisions of Section 801 of the Civil Aeronautics Act[1] is subject to judicial review. The Petitioner, Chicago & Southern Air Lines, Inc., also attempts to raise the question of whether, under the provisions of Section 1006 of the Civil Aeronautics Act,[2] a petition to review a decision of the Civil Aeronautics Board must be filed within sixty days after the entry of an order, when no stay thereof is obtained.

THE STATUTE INVOLVED.

The relevant sections of the Civil Aeronautics Act of 1938, as amended,[3] are set forth in the Appendix, *infra*, pages 15 to 17.

STATEMENT OF THE CASE.

This appeal concerns an opinion and several orders of the Civil Aeronautics Board in a proceeding before the Board concerning applications filed by various parties for certificates of public convenience and necessity to engage in the conduct of air transportation in overseas and foreign commerce. The Respondent herein, Waterman Steamship Corporation, was one of the applicants in this proceeding for a certificate of public convenience and necessity under Section 401 of the Act[4] to engage in air transportation between the United States and Puerto Rico. (R. 42, 95, 96.) Petitioner, Chicago & Southern Air Lines, Inc., was also an applicant for a route between New Orleans and San Juan. However, it sought much broader authorizations and included requests for routes in the Caribbean area generally and also in Central and South American areas. (R. 3-4, 232) There were many other applicants for services in this

[1] 52 Stat. 1014, 54 Stat. 1233 (49 U. S. C. 601).

[2] 52 Stat. 1024, 54 Stat. 1235 (49 U. S. C. 646).

[3] Act of June 23, 1938, C. 601, 52 Stat. 977, 54 Stat. 1233, 54 Stat. 1235) 49 U. S. C. 401 et seq.), referred to as the "Act."

[4] 52 Stat. 987, 54 Stat. 1235 (49 U. S. C. 481).

general area. All of these applications were consolidated by the Civil Aeronautics Board into one proceeding under Docket No. 525 et al., and entitled "Additional Service to Latin America." (R. 118) Hearings were held in the consolidated proceeding in 1944 and, on May 17, 1946, the Board handed down its opinion. (R. 124). In its opinion and orders, the Board granted to the Petitioner, Chicago & Southern Air Lines, Inc., a certificate of public convenience and necessity authorizing it to engage in overseas and foreign air transportation of persons, property, and mail between the co-terminal points New Orleans, Louisiana, and Houston, Texas, and San Juan, Puerto Rico, via various intermediate points. The certificate also authorized service to Caracas, Venezuela, via intermediate points. By its same opinion and orders, the application of Respondent, Waterman Steamship Corporation, was denied.

In accordance with the Board's interpretation of Section 801 of the Act,[5] its decision was then referred to the President of the United States, and on May 22, 1946, the President approved the order of the Board granting a certificate to the Petitioner, Chicago & Southern Air Lines, Inc., and denying the application of the Respondent, Waterman Steamship Corporation. (R. 256) The decision of the Board, as approved by the President, was served upon the parties on May 24, 1946.

The Rules of Practice of the Board provide, with respect to re-hearing, re-argument, or re-consideration of any final order of the Board, that:

> "Such petition for re-hearing, re-argument, or re-consideration must be filed within thirty days after service of the order sought to be vacated or modified." (R. 343)

On June 24, 1946, Respondent, Waterman Steamship Corporation, filed its formal request for a re-hearing. (R. 290) This application for a re-hearing was denied by order of the Board on July 12, 1946. (R. 328)

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[5] Note 1, supra.

Section 1006(a) of the Act[6] provides that:

> " . . . Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

Within a period of sixty days of the final order of the Board with respect to the application of Waterman Steamship Corporation, namely, the order of the Board denying its petition for re-hearing dated July 12, 1946, the Respondent filed its petition for review in the United States Circuit Court of Appeals for the Fifth Circuit. The petition for review was filed September 6, 1946, (R. 1-10).

Upon the filing of Respondent's petition for review, the Civil Aeronautics Board filed a motion to dismiss in the court below for lack of jurisdiction or, in the alternative, to affirm (R. 27). Petitioner, Chicago & Southern Air Lines, Inc., intervened and filed a similar motion (R. 360, 388).

The court below denied the motions to dismiss, holding that it had jurisdiction to review under Section 1006(a) of the Civil Aeronautics Act[7] (R. 412).

It is stated by the Petitioners that this decision of the court below is in conflict with a decision of the United States Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, on the general question of the power of a court

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[6] Note 2, supra.

[7] Note 2, supra.

to review an order of the Civil Aeronautics Board that has been approved by the President.

It is not contended that there is any conflict in the courts below with respect to the question raised by the Petitioner, Chicago & Southern Air Lines, Inc., as to whether the Respondent's petition for review filed below on September 6, 1946, was within the sixty-day period prescribed by Section 1006 of the Act.

SUMMARY OF ARGUMENT.

I.

The question of whether the Respondent's petition for review was filed within the sixty-day period prescribed by the Civil Aeronautics Act is not a substantial question of general importance that should be reviewed by this court, and is not a question upon which there is a conflict of decision in the lower courts.

II.

The power of this court to act on petitions for writs of certiorari is purely discretionary and should not be exercised in this case.

ARGUMENT.

I.

The Question of Whether the Respondent's Petition for Review Was Filed Within the Sixty-Day Period Prescribed by the Civil Aeronautics Act Is Not a Substantial Question of General Importance that Should Be Settled by this Court, and Is Not a Question Upon Which There is a Conflict of Decisions in the Lower Courts.

The question which the Petitioner, Chicago & Southern Air Lines, Inc., alone wishes to raise concerns the timeliness of the filing of Respondent's petition for review in

the United States Circuit Court of Appeals, Fifth Circuit. The Petitioner, Chicago & Southern Air Lines, Inc., contends that the petition for review filed on September 6, 1946, was not filed within the sixty days prescribed by Section 1006 of the Civil Aeronautics Act. It contends that the petition for review should have been filed within sixty days of the initial order of the Board denying Waterman's application which was served on May 24, 1946. Chicago & Southern Air Lines, Inc., recognizes that Waterman filed a request for a re-hearing with the Board on June 24, 1946, which was not denied until July 12, 1946. Therefore, there was no final order of the Board to appeal from until the Board's order of July 12, 1946, denying Waterman's petition for re-hearing. However, Chicago & Southern Air Lines, Inc., contests this proposition on the grounds that Waterman did not request and obtain an order of the Board staying the effective date of the initial order of denial.

This question is of a very minor procedural nature and is certainly not one which might be termed a substantial question of general importance that would warrant this Court's consideration and decision.

This contention on the part of Petitioner, Chicago & Southern Air Lines, Inc., in the court below was summarily dismissed by that court as one not warranting serious consideration or discussion. (R. 409)

Furthermore, this procedural matter has not been the subject of conflicting decisions in the courts below. To the contrary, all the decisions found on this point clearly support the decision of the Fifth Circuit Court.

This precise question was raised in *Braniff Airways, Inc.* v. *Civil Aeronautics Board* (Essair Inc., Intervenor) 147 F. 2d 152 (App. Ct., D. C. 1945) where the court discarded an identical contention. There is no principle of administrative law that is better settled than the rule that no review may be had until administrative remedies have been exhausted. The final order of the Board was its order denying Waterman's Petition for Rehearing.

It is well settled, under the decisions of the courts, that no stay was necessary since the appeal period was suspended until the Petition for Rehearing was denied. *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F. 2d 554, 558 (App. Ct. D. C. 1938).

As the court said in the *Braniff Airways* case (p. 153):

> "Essair contends that the order was not stayed, and that it was therefore necessary to file the petition within sixty days of the date of the order. But we cannot review an order until administrative remedies have been exhausted. For purposes of review, therefore there was no final order until the rehearing was denied. (Citing case.) It follows that the present petition was timely."

II.

The Power of this Court to Act on Petitions for Writs of Certiorari is Discretionary and Should Not Be Exercised in This Case.

The judgment of this court with respect to the granting of petitions for writs of certiorari is a matter of discretion. 28 U.S.C.A. 347. *American Construction Company v. Jacksonville, etc., Railroad Company*, 148 U. S. 372 (1893).

It has also been held that this power is one to be exercised sparingly and only in cases of peculiar gravity or general importance. *American Construction Company v. Jacksonville, etc., Railroad Company* (*supra*). See also *Forsyth v. Hammond*, 166 U. S. 506 (1897).

It is submitted that the issues presented by the instant case are not of peculiar gravity or general importance. Moreover, the law is clear that the court below acted in accordance with the clear and unmistakable provisions of Section 1006 of the Civil Aeronautics Act in assuming jurisdiction of the case and denying the motions of the Petitioners to dismiss the appeal below.

Section 1006(a) of the Act quoted above expressly provides that *any* order issued by the Board, *except* any order in respect of any *foreign air carrier*, shall be subject to

review. An examination of the whole Act shows that there is a distinctive difference made between foreign air carriers and air carriers. Air carriers are defined as citizens of the United States, and conversely foreign air carriers are persons not citizens of the United States. The Act contains two separate and distinct sections which establish the procedure whereby such different types of air carriers may receive authorization to engage in operation. Section 401 of the Act[8] provides for the issuance of certificates of public convenience and necessity to air carriers (that is, citizens of the United States), and Section 402 of the Act[9] provides for the issuance of permits to foreign air carriers (that is, citizens of another state). The intention of Congress to consider all domestic air carriers, whether engaged in interstate or foreign air transportation, in one category, and to consider foreign air carriers in a separate category, is thus clearly demonstrated by the fact that the authority of the Board to issue certificates to domestic carriers to engage in either interstate or foreign air transportation is contained in a single, separate section of the Act and is conditioned upon proof of identical facts, whereas the Board's authority to issue permits to foreign air carriers is contained in a wholly separate and distinct section of the Act and is governed by different standards.

As noted above, the Congress provided two entirely different standards for the issuance of these different classes of authorizations. There is sound reason for this differentiation. The issuance of a certificate to an air carrier usually results in the payment of large sums from the public treasury in the form of compensation for the transportation of mail. The procedure for determining the rates to be fixed for such transportation is established by Section 406 of the Act.[10] The Congress established one standard for the fixing of mail rates for domestic air carriers, and

[8] Note 4, supra.

[9] 52 Stat. 991, 54 Stat. 1235 (49 U. S. C. sec. 482).

[10] 52 Stat. 994, 54 Stat. 735, 54 Stat. 1235 (U. S. C. 485).

an entirely different procedure and standards for the payment of compensation to foreign air carriers for the transportation of mail.

On the interpretation of Section 1006 of the Act,[11] the court below had this to say:

> "All * * * orders are reviewable with one exception—an order in respect of a foreign air carrier subject to approval of the President as provided in Section 801. The words are too plain to be misunderstood. If Congress had intended to except all orders made subject to presidential approval by Section 801, fewer words would have sufficed. * * * Since no foreign air carrier is here concerned and no order has been made concerning such a carrier, the one exception Congress has made does not apply." (R. 410)

The argument of Petitioners is that the Congress, by subjecting to the approval of the President certificates issued to air carriers and involving overseas or foreign air transportation, provided no judicial restraint upon the obtaining of such certificates by misrepresentation and fraud. These elements could not be present with respect to permits granted by the Board to foreign air carriers.

The case at bar provides an example of imposition upon the Board and the President which a court cannot fully perceive except upon a review of the whole record. For example, as Respondent has shown in its Answer filed below, (R. 360) to the motion of Chicago & Southern Air Lines, Inc., to withhold certification and filing of record, Chicago & Southern Air Lines, Inc., represented to the Board in the hearing upon its application in Docket 525, et al., that its estimated earnings on the New Orleans-San Juan route, before mail pay, would amount to $435,000 and that the cost of operating DC-4 equipment on such route would amount to 117.92 cents per mile (R. 365). The President of Chicago & Southern Air Lines, Inc., testified that on the basis of these estimates his Company would be will-

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[11] Note 2, supra.

ing to undertake the proposed operation at a mail rate it was then receiving in its domestic services, namely, 60 cents per ton mile (R. 365).

After it obtained the certificate, and long before any service was commenced on the route, Chicago & Southern Air Lines, Inc., filed a petition with the Board in which the President of the company stated, again under oath, that on the basis of one round trip daily with DC-4 equipment between New Orleans and Havana, the cost of operation would amount —not to 117.92 cents per mile—but would total 286.88 cents per mile (R. 368).

In that petition, it is asserted that Chicago & Southern Air Lines, Inc., instead of earning $435,000 per year, before mail pay, requires the payment of $1.73 per plane mile, or approximately $416,000 per year for the operation of only the New Orleans-Havana segment of the route.

To say that the Courts have no power to review the action of the orders of the Board in this case, is to deny to the other applicants the hearing required by law. It may result, and in many instances has resulted, in the issuance of certificates to applicants whose estimates are not those of prudent businessmen, willing to invest their own funds in the enterprise, but to those who submit the most flagrant misrepresentations as to those factors involved in a determination of fitness, willingness, and ability.

Nor may it be successfully contended that the decision of the court below is in conflict with the settled principles of law as announced by other federal courts and the Supreme Court itself. It is true that there is a conflict between the opinion of the United States Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810. However, as the opinion of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case points out, the opinion of the Second Circuit Court was not in accord with the settled principles of the law of judicial review of administrative and executive action; and was not supported by the de-

cisions of this court or other federal courts. On that point, the court below said:

> "We are aware that this question was decided otherwise in Pan American Airways Co. v. Civil Aeronautics Board, 121 F. 2d 810. The court there leaned upon United States v. Bush, 310 U. S. 371. We think the Bush case does not apply." (R. 411)

The petition for review filed by Waterman below attacked the *legality* of the Board's orders issuing a certificate of public convenience and necessity to Chicago & Southern and denying Waterman's application. The fundamental question in this case is not the abstract problem of the scope of the judicial power over the executive, but the fundamental question of whether administrative and executive powers have been carried out in accordance with the laws of Congress which created them. There is no conflict in the decisions of the lower federal courts or the Supreme Court upon this question. It has been universally held that the courts always have the power to review the legality of the exercise of any administrative or executive power created by the laws of Congress.

State of Wyoming v. *Franke*, 58 Fed. Supp. 890 (1945)
David L. Moss Co. v. *United States*, 103 F. (2d) 395 (1939)
Carl Zeiss, Inc. v. *United States*, 76 F. (2d) 412 (1935)
William A. Foster & Co., Inc. v. *U. S.* (1932) 20 Ct. Cust. & Pat. App. 15
U. S. v. *Fox River Butter Co.* (1932) 20 Ct. Cust. & Pat. App. 38

See also *United States* v. *Abilene & Sou. Ry. Co.*, 265 U. S. 274 (1924); *Shields* v. *Utah Idaho Cent. R. R. Co.*, 305 U. S. 177 (1938).

As the court said in *David L. Moss Co.* v. *United States* (*supra*):

> "There can be no question but that courts must exercise the judicial power vested in them to determine the legal validity of administrative action, where the validity of such action is involved in questions properly before them, whether they have been granted the right of review over action of the administrative agency or not. The duty necessarily arises because of their obligation to decide cases before them according to law. See Shields v. Utah Idaho Cent. R. R. Co., 305 U. S. 177, 59 S. Ct. 160, 83 L. Ed. —, Crowell v. Benson, 285 U. S. 22, 58, 59, 52 S. Ct. 285, 76 L. Ed. 598; United States v. Passavant, 169 U. S. 16, 18 S. Ct. 219, 42 L. Ed. 644; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 641, 26 L. Ed. 875; United States v. Haviland & Co., 2 Cir., 177 F. 175. * * * ."

The attempt of the Petitioners to inject constitutional issues in this case is without merit. Under recent decisions of this court, there can be no doubt but what this proceeding involves a "case or controversy" within the meaning of that phrase in Section 2 of Article 3 of the Constitution of the United States. It is now recognized that the fact that the court of review may not have the power to enforce its orders on the administrative body is immaterial. *Federal Power Commission* v. *Pacific Power and Light Company et al.*, 307 U. S. 156 (1939). In disposing of the contention of Petitioners that possible futility removed jurisdiction, the court below said:

> "The certificates and permits here involved are issued or denied on the orders of the Board. The President cannot make any order, though under Section 801 he can frustrate some of them. * * * The Act clearly defines the function of court and President. Each may be expected to respect the function of the other. Nor is there such prospect of futility as ought to deter the court. Courts try criminal cases notwithstanding an executive pardon may frustrate a conviction. They constantly reach conclusions in all kinds of cases undeterred by the chance that a higher court may disapprove their orders." (R. 412)

The determinative question on this point is whether there is a legal issue clearly drawn to be decided between the parties. As this court said in *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266 (1933):

> "When on the appeal, as here provided, the parties come before the court of appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power." (p. 278)

The attempt to suggest that this case involves the constitutional prerogatives of the President to deal in the matters of the foreign affairs of the United States is equally without merit. This case does not involve the foreign relations of the United States. Section 401 of the Act concerns merely the licensing power to engage in the foreign commerce of the United States. It has always been recognized under the Constitution that the power to regulate the foreign commerce of the United States is vested in Congress and is not one of the exclusive constitutional attributes of the office of the Chief Executive.

For example, in the Merchant Marine Act of 1936,[12] Congress has placed in the United States Maritime Commission powers very similar to the certification provisions of the Civil Aeronautics Act, with no provision for Presidential review or sanction. Subchapter VI of the Act[13] relates to the granting by the United States Maritime Commission of operating-differential subsidy contracts to engage in the foreign commerce of the United States. Such contracts are similar in their overall effect to the certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing foreign air transportation. The pro-

[12] 49 Stat. 1985, ch. 858, approved June 249, 1936 (U. S. C. Title 49, sec. 1101).

[13] 49 Stat. 2001 et seq. (U. S. C. Title 46, sec. 1171 et seq.).

visions of the Merchant Marine Act contemplate the execution of a contract between the Commission and the carrier whereby certain services shall be rendered by the carrier on a specified route or routes in the foreign commerce of the United States. Section 603(a) of the Act[14] provides as follows:

> "If the Commission approves the application, it may enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section for the operation of such vessel or vessels in such service, route, or line for a period not exceeding twenty years, and subject to such reasonable terms and conditions, consistent with this Chapter, as the Commission shall require to effectuate the purposes and policy of this Chapter including a performance bond with approved sureties, if such bond is required by the Commission."

The Act contains no provision for Presidential approval or review of the orders of the Commission in these matters.

CONCLUSION.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for a writ of certiorari should be denied.

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Attorney for Respondent.

FRANCIS H. INGE,
JOSEPH M. PAUL, JR.,
Of Counsel.

June 5, 1947.
Washington, D. C.

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[14] 49 Stat. 2002, 53 Stat. 1185 (U. S. C. Title 46, sec. 1173).

APPENDIX.

Civil Aeronautics Act of 1938 as amended:

SECTION 1. As used in this Act, unless the context otherwise requires—

. . . . . .

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation: PROVIDED, That the Authority may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

. . . . . .

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

. . . . . .

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in foreign air transportation.

. . . . . .

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

. . . . . .

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a

place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * * * * * * * *

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation: PROVIDED, That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

* * * * * * * * * * *

SEC. 402. (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Authority authorizing such carrier so to engage: PROVIDED, That if any foreign air carrier is engaged in such transportation on the date of the enactment of this Act, such carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the Authority shall pass upon an application for a permit for such transportation if within said one hundred and twenty days such carrier files such application as provided in this section.

* * * * * * * * * * *

SEC. 801. The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate au-

thorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401(e) or any permit issuable under section 402(c) or to the original terms, conditions, or limitations of any such certificate or permit.

* * * * * * * * * * *

SEC. 1006. (a) Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

* * * * * * * * * * *

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NOS. 78 AND 88.

CHICAGO & SOUTHERN AIR LINES, INC.,

AND

CIVIL AERONAUTICS BOARD, *Petitioners*,

V.

WATERMAN STEAMSHIP CORPORATION, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

BON GEASLIN,
Attorney for Respondent.

Of Counsel:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

NOS. 78 AND 88.

CHICAGO & SOUTHERN AIR LINES, INC.,

AND

CIVIL AERONAUTICS BOARD, *Petitioners,*

V.

WATERMAN STEAMSHIP CORPORATION, *Respondent.*

ON WRIT OF CERTIORARI

To The

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT.

QUESTIONS PRESENTED.

(1) The basic question presented by this case is whether the plain language of Section 1006(a) of the Civil Aeronautics Act of 1938, that "Any order * * * issued by the Authority (Board) under this Act, except any order in respect of any foreign air carrier subject to the approval of the President * * *, shall be subject to review by the circuit courts of appeals of the United States * * *,"

means what it says, or whether it denies to the courts jurisdiction to review an order of the Civil Aeronautics Board, which has been approved by the President, granting a certificate of public convenience and necessity authorizing overseas or foreign air transportation.

(2) Whether the Congress deprived the courts of their inherent power to review questions of law as to whether the Civil Aeronautics Board in granting a certificate of public convenience and necessity complied with the terms of the statute, simply by providing that the issuance or denial of such certificate shall be subject to the approval of the President.

(3) Petitioner, Chicago & Southern Air Lines, Inc., has raised the additional question as to whether the filing of the Petition for Review was timely although filed within sixty days of the final order of the Civil Aeronautics Board.

THE STATUTE.

For the convenience of the Court, we summarize below the pertinent provisions of the Civil Aeronautics Act of 1938[1] relating to the statutory pattern which the Congress has established for the authorization of persons to engage in air transportation. The Congress has made a basic distinction in the Act between "air carriers" and "foreign air carriers", and has legislated differently with respect to each of such class of carriers. The distinction is important to keep in mind, because it has a determinative effect upon the question to be decided.

Broadly speaking, the Act applies to air transportation the same plan of certificates of convenience and necessity, which Congress had applied to railroads in paragraphs 18 to 20 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920,[2] and which it

[1] Act of June 23, 1938, 52 Stat. 977, 54 Stat. 1233, 54 Stat. 1235, 49 U. S. C. 401, *et seq.*

[2] Act of February 28, 1920, c. 91, 41 Stat. 477, 478, 49 U. S. C. 1 (18-20).

had followed as to telephone, telegraph and commercial radio communication in the Communications Act of 1934,[3] and as to motor carriers in the Motor Carrier Act of 1935,[4] and as to water carriers in the Transportation Act of 1940.[5]

The provisions of the Civil Aeronautics Act in respect of certificates of public convenience and necessity are found in Section 401. (49 U. S. C. Sec. 481)

Section 401(a) (49 U. S. C. Sec. 481(a)) is a general prohibition. "No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation."

Section 401(b) (49 U. S. C. Sec. 481(b)) provides that "Application for a certificate shall be made in writing to the Authority and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority shall by regulation require."

Section 401(c) (49 U. S. C. Sec. 481(c)) provides that upon the filing of any such application, the Civil Aeronautics Board[6] shall post a notice thereof in the office of its secretary and give notice to such other persons as it may by regulation determine; also that any interested person may file a protest or memorandum of opposition

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[3] Act of June 19, 1934, c. 652, 48 Stat. 1075, 57 Stat. 11, 47 U. S. C. 214.

[4] Act of August 9, 1935, c. 498, 49 Stat. 551, 52 Stat. 1238, 54 Stat. 923, 49 U. S. C. 306.

[5] Act of September 18, 1940, c. 722, 54 Stat. 941, 49 U. S. C. 909.

[6] Prior to July 1, 1940, the Civil Aeronautics Board was known as the Civil Aeronautics Authority. It is so referred to in the Civil Aeronautics Act of 1938 (49 U. S. C., Sec. 401, *et seq.*). The change of name was effected by the President's Reorganization Plan No. IV, 5 Fed. Reg. 2421-2422. Petitioner Board will, throughout this brief, be referred to as the Board except that, in the case of extracts from or paraphrases of the Act, it will be referred to as "The Authority."

to or in support of the issuance of a certificate. The section further provides that "Such application shall be set for public hearing."

Section 401(d) (49 U. S. C. Sec. 481(d)) enunciates the standards which are to govern the action of the Board in issuing certificates. It is provided that "The Authority shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied."

As heretofore stated, Section 401(a) is a prohibition upon an "air carrier" from engaging in "air transportation" without a certificate of public convenience and necessity. The quoted terms are defined in Section 1 (49 U. S. C. Sec. 401). Paragraph (2) of that Section defines "air carrier" to mean "*any citizen* of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation." Paragraph (10) of Section 1 defines "air transportation" to mean "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft." These terms are defined in paragraph (21). "Interstate air transportation" means, broadly speaking, air transportation between places in different states or between places in the same territory or possession. "Overseas air transportation" means air transportation between the continental United States and a territory or possession or between different territories or possessions. "Foreign air transportation" means air transportation between a place in the United States and a foreign country.

While the provisions of Section 401 apply equally to "interstate," "overseas" and "foreign" air transportation, the section thus relates entirely to the conduct of

air transportation *by citizens* of the United States. A foreign company is not an "air carrier" but a "*foreign air carrier.*" (Section 1(19).) A "foreign air carrier" may not engage in "interstate" or "overseas" air transportation at all. It may engage in "foreign" air transportation only as provided in Section 402 of the Act (49 U. S. C. Sec. 482). Under that section it must obtain, not a "certificate of public convenience and necessity" provided for in Section 401, but a "permit" pursuant to Section 402. Under Section 402(b), the Board is "empowered" but not required to issue a permit, upon making certain findings.

Section 406 (49 U. S. C. Sec. 486) authorizes the Board to fix rates for the transportation of mail by an "air carrier" and prescribes the procedure and standards by which such rates are to be fixed. Section 406(f) (49 U. S. C. Sec. 486(f)) provides that no foreign air carrier may be paid a rate of compensation for transporting mail between the United States and any foreign country which will result in such foreign air carrier receiving a higher rate of compensation than such foreign country pays to air carriers under the United States flag for transporting its mail between such foreign country and the United States.

The Petition for Review herein was filed under Section 1006(a) of the Civil Aeronautics Act. This reads as follows (49 U. S. C. Sec. 646):

> "Judicial Review of Authority's Orders
> Orders of Authority Subject to Review
>
> Sec. 1006. (a) Any order, affirmative or negative, issued by the Authority under this Act, *except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act*, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by

leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." (Italics ours)

The primary question raised by the Petitioners appears to arise from Section 801 of the Act (49 U. S. C. Sec. 601), which is as follows:

"The President of the United States

Sec. 801. The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Authority before hearing thereon, and all decisions thereon by the Authority shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401(e) or any permit issuable under section 402(c) or to the original terms, conditions, or limitations of any such certificate or permit."

STATEMENT OF THE CASE.

(a) Procedural Steps.

On December 19, 1940, Waterman Airlines, Inc., a subsidiary of the Respondent here, filed its verified application with the Civil Aeronautics Board under the provisions of Section 401 of the Civil Aeronautics Act for a certificate of public convenience and necessity, authorizing it to engage in the scheduled air transportation of persons, property and mail between the terminal points of New Orleans, Louisiana, and San Juan, Puerto Rico, via the intermediate point of Tampa, Florida. The application was designated as Civil Aeronautics Board Docket No. 525.

Subsequently, on June 26, 1941, and September 27, 1943, Waterman Airlines, Inc., filed amendments to its original application which, among other things, eliminated that part of its application for authority to transport mail. On February 9, 1944, the application was further amended by substituting the name of Waterman Steamship Corporation, (hereinafter referred to as "Waterman"), the Respondent here, as the applicant. Waterman for many years has operated a steamship service between New Orleans, Louisiana, and San Juan, Puerto Rico, with cargo vessels equipped to carry twelve passengers.

On October 5, 1942, Chicago and Southern Air Lines, Inc., (hereinafter referred to as "C & S") filed with the Board its verified application for a certificate of public convenience and necessity, authorizing scheduled air transportation of persons, property and mail over various routes in the Caribbean and Central American areas, which application was designated as Docket No. 798. Subsequently, various amendments were filed by C & S to its application for a certificate authorizing scheduled air transportation of persons, property and mail over several routes in the Caribbean, Central and South American areas, which included a route between New Orleans, Louisiana, and San Juan, Puerto Rico, via certain specified intermediate points in foreign countries.

On or about December 6, 1943, the Board consolidated for hearing, under the designation of Docket No. 525, *et al.* (hereinafter referred to as the "*Latin American* Case", 6 C.A.B. 857) some 29 applications which had been filed by 15 applicants for modifications of existing certificates of public convenience and necessity, and for new certificates authorizing scheduled air transportation services on various routes between the United States and Mexico, Central America, Latin America, and the Caribbean area.

Hearings were held before Examiners of the Board on September 18 through October 13, 1944. The Report of the Examiners was served on the parties on March 5,

1945. Exceptions and briefs in support thereof were filed, and oral arguments were heard by the Board from April 30 to May 5, 1945.

On May 6, 1946, more than eighteen months after the close of the hearing and before the Board had issued or denied any certificate of public convenience and necessity in the proceeding, Waterman filed its Motion to Reopen the Proceeding to Receive Further Evidence and for Reargument. (R. 100) This Motion was denied by the Board by its Order Serial No. 4795, served upon Respondent on May 24, 1946, (R. 114). On the same date the decision and order of the Board, Serial No. 4793, granting a certificate to C & S and denying Waterman's application was served. Thereafter, within the time prescribed by the Regulations of the Board, (R. 290) Waterman filed its Petition for Rehearing and Reconsideration, which Petition was by the Board's Order No. 4977, denied on July 12, 1946. (R. 328)

On September 6, 1946, Waterman filed in the United States Circuit Court of Appeals for the Fifth Circuit its Petition for Review of the Orders and Opinion of the Board referred to above. Under date of November 4, 1946, the Board filed its Motion to Dismiss the Petition for Review or in the Alternative to Affirm the Board's Orders (R. 27) and its Motion to Withhold Certification and Filing of Record (R. 33). On October 30, 1946, C & S filed its Motion for Leave to Intervene (R. 354). The Motion was granted by Order of the Court dated November 8, 1946. (R. 358) On November 22, 1946, Waterman filed its Answer to the Motion of the Board to Withhold Certification and Filing of Record (R. 360), to which was attached Exhibit No. 1, Exhibit No. 2, and Exhibit No. 3 which are important to the consideration of this case. On November 29, 1946, C & S filed its Motion to Dismiss the Petition for Review, or in the Alternative to Affirm the Orders of the Civil Aeronautics Board. (R. 388) On December 2, 1946, the Board filed its reply and support-

ing memorandum on Motion to Withhold Certification and Filing of Record. (R. 399)

On January 27, 1947, the case was called on the Motions filed by the Petitioners here to Dismiss the Petition for Review, which Motions were on February 14, 1947, denied. (R. 413) The decision of the Court below was in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board, et al.* 121 F. (2d) 810. Certiorari was granted June 16, 1947. (R. 414)

(b) The Orders Sought to be Reviewed, and Issues Raised.

Waterman seeks judicial review of three orders of the Board. The first of these was the order of the Board dated May 17, 1946, Serial No. 4793. This order granted the application of C & S for a certificate of public convenience and necessity under Section 401 of the Civil Aeronautics Act (49 U. S. C. Sec. 481), authorizing air transportation between the co-terminals Houston, Texas, and New Orleans, Louisiana, and the terminal point San Juan, Puerto Rico, by way of several specified intermediate points in foreign countries. The order also denied the application of Waterman for a certificate of public convenience and necessity authorizing transportation by air of persons and property between the terminal points New Orleans, Louisiana, and San Juan, Puerto Rico, via Tampa, Florida. This order was approved by the President on May 22, 1946, and served on May 24, 1946.

The second order sought to be reviewed is likewise dated May 17, 1946, served May 24, 1946, and bears Serial No. 4795. It was not approved by the President. This order denied the Motion of Waterman to Reopen the Proceeding in Civil Aeronautics Board Docket No. 525, *et al.*, insofar as it related to the proposed service between New Orleans, Louisiana, and San Juan, Puerto Rico, for the purpose of receiving further evidence and reargument.

The third order (which was not approved by the President), is dated July 12, 1946, and bears Serial No. 4977. This order denied the petition of Waterman for a rehearing and reconsideration of the findings of fact and decision of the Board in Civil Aeronautics Board Docket No. 525, *et al.*, and in particular for a reconsideration of the orders of the Board dated May 17, 1946, bearing Serial Nos. 4793 and 4795, referred to above.

Although the language of Section 1006(a) of the Civil Aeronautics Act is perfectly clear, the Board and C & S, the Petitioners here, contend that the decision and orders of the Board are not subject to judicial review by reason of the fact that the Order granting the Certificate was approved by the President.

The Petition for Review, therefore, raises important questions concerning the construction of Section 401 of the Civil Aeronautics Act as to the criteria governing the requirements of public convenience and necessity; the adequacy of the evidence to support the findings of the Board, with respect to fitness, willingness and ability of C & S; whether evidence adduced at hearings that closed in October, 1944, could possibly support the findings and orders of the Board under the wholly changed conditions, as shown by the record, when the Board issued its orders dated May 17, and July 12, 1946; and whether the action of the Board, under such circumstances, by its Order No. 4795, dated May 17, 1946, and served May 24, 1946, denying a petition that the record be reopened to enable Waterman to present evidence as to the effect of events since the close of the hearing, was not such an abuse of discretion as to constitute a "denial of right" within the doctrine of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 284 U. S. 248.

SUMMARY OF ARGUMENT.

I. Section 1006(a) of the Civil Aeronautics Act provides that any order of the Board, except an order in respect of any foreign air carrier subject to the approval of the President, shall be subject to judicial review. The orders sought to be reviewed in this case do not relate to a foreign air carrier. They concern an air carrier, which must meet the requirements of the provisions of the Civil Aeronautics Act before the Board may lawfully grant to it a certificate to engage in overseas or foreign transportation. The granting of certificates of public convenience and necessity under the Civil Aeronautics Act is a regulation of commerce and does not fall within the scope of the President's constitutional control of the conduct of international relations.

The decision of the United States Circuit Court of Appeals for the Second Circuit in *Pan American Airways Co. v. Civil Aeronautics Board, et al., supra,* was erroneous. The Congress considered and rejected language which might be subject to the construction adopted by that Court and urged by the Petitioners here.

The efforts of Petitioners to liken the issuing of certificates of convenience and necessity by the Civil Aeronautics Board to the conduct of our international relations, with respect to which the President alone has the power to act, is without merit. The foreign water-borne commerce of the United States has been subject to international agreements and treaties from the beginning of the government. The Merchant Marine Act, 1936,[7] provides that the United States Maritime Commission may enter into contracts for the payment of operating differential subsidies to operate vessels on essential routes in the foreign commerce of the United States. These bear great similarity in their overall effect to certificates of public convenience and necessity issued by the Civil Aeronautics Board authorizing overseas and foreign air transporta-

[7] Act of June 29, 1936, c. 858, 49 Stat. 2001, 46 U. S. C. 1171 *et seq.*

tion. These subsidies are based upon the difference in operating costs between vessels under the United States flag and similar competing vessels under foreign flags. Additional subsidies may be granted by the United States Maritime Commission to offset the effect of governmental aid paid to foreign competitors. Those provisions go to the very heart of our relations with other countries as they affect shipping, and it is possible that they could result in a "shipping war" leading to grave international consequences. Yet the Congress has not provided for the participation of the office of the Chief Executive in the granting of such subsidies.

A determination as to which particular American air carrier should be authorized to operate an airline in interstate or overseas air transportation, or even to a foreign country, is not a question which is committed to the exclusive control of the President by the Constitution, any more than a determination as to which steamship company shall be given a subsidy to operate in foreign commerce. We need not consider whether the question could have been committed by the Congress to the exclusive decision of the President, because that was not the course which the Congress and the President pursued. They placed responsibility for decision in an independent agency and made the granting of certificates subject to Presidential approval and to judicial review. The latter provision was no more unconstitutional than the former.

The fact that the Board or the President may reach the same conclusion upon a reconsideration of the case which they reached in the first instance, is no ground for denying judicial review. There is no more reason to assume that the Board or the President will disregard the judgment of this Court than that lower courts may do so.

II. The power to regulate commerce is in the Congress and when it has legislated the courts have an inherent power to see that the terms of the statute are observed.

The Civil Aeronautics Board may not disregard the provisions of the statute and issue an order without substantial evidence to support its findings. The Congress provided for judicial review of such questions in order to make sure that the Civil Aeronautics Board complies with the statute and does not base its orders upon arbitrary or extra-legal considerations.

III. The Petition for Review was filed within sixty days after the final order of the Civil Aeronautics Board. The filing of a petition for rehearing suspends the running of the time within which the petition for review may be filed.

ARGUMENT.

I.

THE CIVIL AERONAUTICS ACT UNMISTAKABLY CONFERS UPON THE COURTS JURISDICTION TO REVIEW THE ORDERS OF THE BOARD WHICH ARE INVOLVED IN THIS CASE.

(a) The Language of the Act Negatives the Interpretation Sought To Be Given It by the Board and C. & S.

We have previously quoted Section 1006(a) of the Act, pursuant to which the Petition for Review in this case was filed. The language is as broad as it possibly could be. "Any order, affirmative or negative," is made subject to judicial review with the single exception of "any order in respect of any *foreign air carrier*" subject to the approval of the President under the provisions of Section 801 of the Act.

An order granting or denying a certificate of public convenience and necessity comes plainly within the scope of this language.

The Petitioners here, following the decision in *Pan American Airways Co.* v. *Civil Aeronautics Board, et al., supra*, seek to graft an additional exception upon the provisions by suggesting that the language ought to read "except any order subject to the approval of the President

as provided in Section 801 of this Act." This collides head-on with the fact that Congress itself made an exception to the generality of the opening phrase, and made the exception much narrower than that for which counsel contend. It did this by excepting from judicial review "any order in respect of any *foreign air carrier* subject to the approval of the President as provided in Section 801 of this Act." (Italics ours) As previously pointed out, a "foreign air carrier" is a foreign citizen. None of the orders here under consideration relates to a "foreign air carrier."

It is a well recognized rule of statutory construction that the specification of one exception indicates a legislative intention to exclude all others. *Bend* v. *Hoyt*, 13 Pet. 263, 271-272; *Dubuque Electric Company* v. *City of Dubuque, Iowa*, 260 F. 353 (C. C. A. 8th). Exceptions from a general provision in statutes are to be strictly construed. *Hartford Electric Light Co.* v. *Federal Power Com.*, 131 F. (2d) 953, (Cert. Den. 319 U. S. 741).

The language of Section 1006(a) thus completely refutes the decision of the Circuit Court of Appeals for the Second Circuit, and the arguments urged upon this Court, that the Congress excepted from judicial review orders dealing with interstate, overseas or foreign air transportation which are subject to approval of the President under Section 801. The case is not as it would be if Section 1006 had been completely silent as to the review of such orders. Instead, when Congress enacted, and the President approved the Civil Aeronautics Act, they made a sharp division, for the purpose of judicial review, between the various orders of the Board that were subject to approval of the President under Section 801. Orders granting or denying *permits* to foreign citizens were not to be reviewed by the courts. Orders granting or denying *certificates* to United States citizens were to be subject to judicial review. By express language, orders granting or denying certificates to United States citizens that were

subject to approval under Section 801 were made reviewable to precisely the same extent as orders granting or denying certificates that were *not* subject to such approval. The citizenship of the carrier, not the necessity of approval under Section 801, was made the test of reviewability. Implications alleged to arise from the general scheme of the Act cannot prevail against the specific language used. The meaning of a statute must first be sought in the language employed. If that be plain, as it is here, the Courts will enforce it, if it is within the constitutional authority of the legislative body which enacted it *United States* v. *Standard Brewery*, 251 U. S. 210; *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607.

(b) The Legislative History of Sec. 1006(a) Demonstrates That the Congress Provided Exactly What It Intended.

The Congressional purpose as manifested by the text of Section 1006(a) is not rendered doubtful by legislative history which only confirms what Congress has formally said. *Addison* v. *Holly Hill Fruit Products, supra.* Such history reinforces the perfectly clear language of Section 1006(a) of the Act by showing that the Congress deliberately rejected a provision which, if it had been adopted, might have had the result for which the Petitioners here contend.

The original bill, which later became the Civil Aeronautics Act of 1938, excepted from judicial review *all* orders of the Board in respect of *foreign air transportation* approved by the President under Section 801—whether such orders related to operations by United States air carriers or by foreign air carriers. In that Bill, S. 3845, introduced by Senator McCarran on April 14, 1938, in the 75th Congress, 3d Session, Section 1006(a) read in part as follows:

> "Sec. 1006. (a) ORDERS OF AUTHORITY (BOARD) SUBJECT TO REVIEW.—Any order, affirmative or negative, issued by the Authority (Board) under this Act, ex-

cept an order in respect of foreign air transportation approved by the President as provided in section 801 of this Act, shall be subject to review . . . ".

However, in the bill as reported by the Committee on Commerce of the United States Senate, on April 19, 1938, the first few lines were changed to read as follows (the part struck through being eliminated and the part in italics being added):

> "Sec. ~~1006~~ 1005. (a) ORDERS OF AUTHORITY (Board) SUBJECT TO JUDICIAL REVIEW.—Any order, affirmative or negative, issued by the Authority (Board) under this Act, except ~~an~~ *any* order in respect of *any* foreign air ~~transportation approved by~~ *carrier subject to the approval of* the President as provided in Section 801 of this Act, shall be subject to review . . . ."

The bill was enacted in this form.

In other words, the Congress deliberately changed the language of the bill so as to narrow the exception to the general principle of judicial review. Petitioners now seek to enlarge the exception even beyond the form which the Congress considered too broad. The language, however, is so plain in its commands as to leave no doubt as to its meaning.

We assume it will not be questioned that an order of the Board, similar to those involved here with respect to air transportation, granting a citizen of the United States a certificate to engage in air transportation between New York State and the State of California, is subject to judicial review. *Federal Radio Commission* v. *Nelson Brothers*, 289 U. S. 266; *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 79 App. D. C. 341, 147 F. (2d) 152. In such a case the court can establish the proper construction of the provisions of the Act dealing with all the questions involved in this case. But, under the decision in the *Pan American Airways* Case, *supra*, and the contentions here, an order granting the same citizen a certificate to engage in air transportation

between two points in Hawaii, or between New Orleans, Louisiana, and San Juan, Puerto Rico, is not subject to judicial review; and the Board, in determining the latter case, would be free to ignore a decision as to the meaning of identical words in the Act laid down by the court in the former case. All this is said to result in the case of certificates to operate beyond the continental limits of the United States, because Congress provided that orders of the Board with respect to such certificates shall be subject to the approval of the President.

Petitioners' argument really comes down to an assertion that while the Civil Aeronautics Act vests in the Board the power to issue certificates for air transportation between points in different States and to do so only upon carefully defined procedures and standards, the Congress and the President intended that the vast subject of certificates for air transportation between the United States and a foreign country, between the United States and a territory, between territories, or between points in the same territory, should be left almost completely at large.

If the Congress and the President had any such intention at the time of the enactment of the Civil Aeronautics Act, they certainly concealed it in a most remarkable fashion.

II.

THE ORDER GRANTING THE CERTIFICATE TO C & S DOES NOT PRESENT A QUESTION DEALING WITH ACTION WHICH, APPROPRIATELY BELONGING TO THE EXECUTIVE PROVINCE, IS NOT THE SUBJECT OF JUDICIAL REVIEW.

(a) The Courts Have Freely Passed Upon Acts of Administrative Agencies Dealing With Foreign Commerce.

The Court in the *Pan American Airways* case, *supra*, seems to have reached the conclusion that the Congress did not intend to provide for judicial review of orders such as we have here, because, as stated by the Court, the respon-

sibility for the conduct of our international relations is committed exclusively to the President. In that case the Court said (page 814):

> ". . . It seems incredible that in enacting Section 1006(a) Congress intended to permit a review of the action of the Board to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. (Citing cases). The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in Executive discretion that it cannot be regarded as authorized by Section 1006(a)."

That decision and the argument of Petitioners here confuse the power of the President over foreign affairs with the power of the Congress to regulate commerce between the several states and with foreign nations. They completely disregard the historic facts with respect to the conduct of our trade and communications with other countries, and the cases relied upon by Petitioners and by the Court in the *Pan American Airways* case, *supra*, do not support the conclusions contended for.

We are not dealing here with a proclamation of the President which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching to executive action. Neither the Congress nor the Courts have ever regarded the licensing power, even though it may concern transportation or communication with a foreign country, as an exclusive function of the President.

In *United States* v. *Western Union Telegraph Company*, 272 F. 893 (C. C. A. 2), the Court recognized this when it said: (p. 894)

> "Concededly the right to permit or to prohibit the landing of cables between foreign countries and the American coast is in Congress, under its power to

regulate commerce between the states and between the states and foreign countries. In point of practice Congress on several occasions has done so by acts of Congress and sometimes the President had done so as Chief Executive, and sometimes cables have been laid by corporations without any permit at all."

The Interstate Commerce Act applies to commerce between the United States and foreign countries. *United States* v. *Grand Trunk Ry. Co.*, 225 F. 283, *Galveston H. & San Antonio Ry.* v. *Woodbury*, 254 U. S. 357, *Western Union Telegraph Co.* v. *Esteve Bros. and Co.*, 256 U. S. 566. That Act contains no provisions for Presidential approval of orders of the Commission, and the Courts have repeatedly reviewed its orders relating to the foreign commerce. *Lewis Simas Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654; *News Syndicate Co.* v. *New York Central Railroad Co.*, 275 U. S. 179.

The Congress has also entrusted the Federal Communications Commisison with powers to deal with matters concerning the foreign commerce of the United States. The courts in many cases have passed upon its action in such cases. *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 97 F. (2d) 641 (App. D. C.). As the Court said in *Z. & F. Assets Realization Corporation* v. *Hull*, 311 U. S. 470, 489: "The question in this relation is simply one of the intent of Congress as disclosed by the Act." That the Congress has provided for judicial review of the Board's orders which we have here is perfectly clear.

The Board argues that an understanding of the intimate relationship of overseas and foreign air transportation to international relations and national defense contributes materially to an understanding of the necessity for subjecting the action of the Board in this field to the authority of the President and of the unsuitability of the subject for judicial review (Brief, p. 15, No. 88).

C & S in its brief follows the same theme. That argument erroneously assumes, first, that the Congress in the

enactment of the Civil Aeronautics Act, after years of study, and after hearings extending over several sessions, was lacking in an understanding of the relationship of such transportation to international relations and national defense, and, second, that the character of overseas and foreign air transportation is so different from other forms of transportation and communication by which our commercial intercourse with other nations is conducted, that it falls in the category of foreign affairs, with respect to which the President alone has the power to speak or listen as a representative of the nation.

The Petitioners have cited numerous treaties or agreements existing or being negotiated between the United States and foreign countries with respect to conduct of air transportation between such countries. They seek to liken the issuance of certificates of public convenience and necessity authorizing overseas and foreign air transportation to such agreements, and argue that the issuance of such certificates are exclusively the function of the Chief Executive under his powers to conduct the foreign relations of the United States. But such is not the case. The foreign water-borne commerce of the United States has been, since the founding of the nation, subject to innumerable treaties, agreements, protocols and other arrangements, and yet Congress granted the United States Maritime Commission the power to enter into operating differential subsidy contracts without providing for Presidential review.

International air transportation in its initial stages was accorded infinitely more freedom than was ever afforded the conduct of foreign commerce by sea.

The international aspects of foreign air transportation have only recently become evidenced by agreements or treaties. On the other hand, the foreign commerce of the United States on the high seas has been subject to international agreements and treaties since its inception. Probably the first of these was the treaty of Amity and Com-

merce entered into between the United States and France in 1778 which amounted to a bilateral treaty between the two countries, guaranteeing to the citizens and the ships of the contracting parties equal rights and entry to the respective countries and ports. Equally well known are the treaties containing the so-called most-favored-nation provision, which are by far the most numerous of the overseas commerce treaties of the United States, and which provide that the contracting parties agree to extend equally favorable rights and privileges to each other as provided for in similar treaties entered into with the most favored nation of either of the contracting parties.

The attempt of the Petitioners, therefore, to attach special significance to the certificates of public convenience and necessity authorizing overseas or foreign air transportation by reason of the existing international air transport agreements, is without merit. The necessity for and existence of the international air transport agreements does not place the power to grant such certificates exclusively in the office of the Chief Executive. The conduct of the foreign commerce of the United States by sea is subject to, and dependent upon international agreements or treaties to the same extent as foreign commerce by air.

Title VI of the Merchant Marine Act, 1936, concerns the granting by the United States Maritime Commission of operating differential subsidies to operate vessels on essential routes in the foreign commerce of the United States. Such contracts bear great similarity in their overall effect to the certificates of public convenience and necessity issued by the Board authorizing foreign air transportation. They are vastly more intimately connected with our relations with foreign countries than certificates authorizing overseas and foreign air transportation. This is because the subsidies authorized are based upon the difference in operating costs of vessels under the United States flag and the operating costs of similar vessels under foreign

flags. (Sec. 603(a), Merchant Marine Act, 1936, 46 U. S. C., Sec. 1173, 49 Stat. 2002). Compensation for the transportation of mail by aircraft in foreign commerce is not fixed upon a basis that so closely involves our relations with other countries. The Merchant Marine Act goes even further and provides in Section 604, as amended (46 U. S. C., Sec. 1174, 49 Stat. 2003, 52 Stat. 959, 53 Stat. 1185), that the Maritime Commission, after consultation with the Secretary of State, may grant such additional subsidy as it determines to be necessary to offset the effect of governmental aid paid to foreign competitors. Those provisions go to the very heart of our relations with other countries as they affect shipping. Such provisions could result in a "shipping war" leading to grave international consequences. There is no comparable provision in the Civil Aeronautics Act of 1938. Yet the Merchant Marine Act contains no provision for the participation of the office of the Chief Executive in the issuance or granting of such subsidy contracts, and authorizes the Commission to consult with the Secretary of State only in those instances relating to the granting of countervailing subsidies. He is given no power to veto or approve the Commission's decisions.

It is submitted that there is no basic difference between the conduct of the foreign commerce of the United States by air or by sea. Both are subject to and governed by the terms of existing international agreements or treaties. If Congress can entrust the granting of licenses to engage in foreign commerce by sea to an administrative agency alone, Congress could have likewise legislated identically with respect to foreign commerce by air. It is clear, therefore, that there is no constitutional inhibition against subjecting to judicial review the orders of the Board with respect to the issuance of certificates authorizing overseas and foreign air transportation.

This Court has recognized the propriety of judicial review of administrative determinations in matters far more

closely affecting the conduct of foreign relations than does the granting of a certificate of public convenience and necessity to operate an airline to a foreign country. Thus, although the power to exclude or expel aliens has been defined to be "a power affecting international relations", it has never been questioned that the courts may be invested with power to review administrative action, the Supreme Court saying in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, 714 (1893):

> "It is no new thing for the law-making power, acting either through treaties made by the President and Senate, or by the more common method of acts of Congress, to submit the decision of questions, not necessarily of judicial cognizance, either to the final determination of executive officers, or to the decision of such officers in the first instance, with such opportunity for judicial review of their action as Congress may see fit to authorize or permit."

Still more striking is the decision in *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, sustaining a statute which submitted for judicial determination the question whether certain monies paid to the Secretary of State by the Mexican Government pursuant to an award of a commission appointed to settle various claims of United States citizens, had been obtained by fraud. The Court said at page 462:

> ". . . Both branches of the Government were concerned in the enactment subjecting that question to judicial determination, and it cannot properly be said that the President, by approving the act of 1892 or by recognizing its binding force, surrendered any function belonging to him under the supreme law of the land."

See also *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272.

(b) The Order Granting the Certificate to C & S Is the Order of the Board.

The power under the Constitution to regulate commerce being in the Congress, it is not one of the exclusive attributes of the office of the Chief Executive. Therefore, the Congress may delegate the power to issue licenses to engage in the foreign and domestic commerce of the United States to an administrative body, and make such licenses as relate to overseas, or foreign air transportation, or air transportation within or between territories or possessions of the United States subject to the approval of the President, as it has done in the Civil Aeronautics Act.

Nothing in Section 401 of the Act suggests any basic difference in the procedure for handling applications for certificates to engage in foreign air transportation, overseas air transportation, and air transportation between points in the same territory, on the one hand, and applications to engage in air transportation between the states, on the other. Section 401(a) refers to "a certificate issued by the Authority." Section 401(b) directs that "application for a certificate shall be made in writing to the Authority", and Section 401 (c) requires that "the Authority shall dispose of such application." Section 401(d) directs that "the Authority shall issue a certificate" on making the findings therein specified.

That section deals with all types of air transportation indiscriminately. Section 801 modifies the procedure in a case of applications for certificates to engage in the three types of air transportation referred to therein only in the following respects: (1) Copies of applications are to be transmitted to the President before hearing thereon; (2) Decisions by the Board are to be submitted to the President before publication thereof; and (3) the issuance or denial of the certificate "shall be subject to the approval of the President." However, the certificate is issued or denied by the Board upon findings of fact made by it, because no one but the Board can issue a certificate. The President is not required to make any findings or

determinations or to issue any proclamation as is the historic practice in instances dealing with powers appropriately belonging to the executive province.

We may be sure that if the Congress had intended to impose upon the President the burden of issuing certificates for the types of air transportation specified, it would have found apt language in which to express that intention.

It may be conceded that the Congress may not subject to judicial review a matter committed by the Constitution to the exclusive control of the President. We assume, for example, that the Congress could not provide for review of the President's decision to recognize a particular foreign government. But determination as to which particular United States citizen should be authorized to operate an airline to a territory or possession of the United States, or even to a foreign country, is not a question of that sort. Indeed, it is a question over which, until 1938, no agency of the government had any control.

We need not consider whether, when governmental control was determined to be desirable, the question could have been committed to the exclusive decision of the Executive. This was not the course which the Congress and the President pursued. They placed the responsibility for decision in an independent agency and made its acts subject both to Presidential approval and to judicial review. The latter was no more unconstitutional than the former.

The Congress and the President enjoined upon the Board a course of procedure and certain rules of decision in the performance of it function. The Board must pursue such rules and procedure and show a substantial compliance therewith to give validity to its action. When, therefore, the statute requires as a condition precedent to its order that the findings of fact made by it be supported by substantial evidence, the validity of the order must rest upon that condition. If as a matter of law, substantial evidence is lacking, the order is ineffective. *Wichita R. & Light Co.*

v. *Public Utilities Commission*, 260 U. S. 48; *Chicago Junction* case, 264 U. S. 258; *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. The approval by the President of an order of the Board which it had no authority to issue cannot give such order any legal effect.

The President, in approving action by the Board, must necessarily have assumed that the Board had properly carried out the mandate imposed on it by a statute which the Congress had enacted and the President had approved. If the Court should determine that the Board had erroneously construed the statute or had otherwise departed from the rules which the Congress had laid down, that decision would not involve judicial scrutiny of the President's action. It would simply mean that the Board ought not to have proceeded to secure Presidential approval at all. It is not to be assumed that the President would desire such a certificate to stand.

(c) The Decisions Cited by the Court in the Pan American Airways Case, and Relied Upon by Petitioners Here Are Not Applicable.

The Court in the *Pan American Airways* case, *supra*, in support of its decision that judicial review of the Board's orders granting a certificate is precluded, cited *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, and *United States* v. *Belmont*, 301 U. S. 324. These cases are not authority for the Court's conclusion.

In the *Curtiss-Wright* case, the Court upheld, as against a claim of unconstitutional delegation of power, a joint resolution of Congress (48 Stat. 811) authorizing the President, upon certain findings by him and after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, to impose by proclamation an embargo upon the sale of arms and munitions of war to countries engaged in armed conflict. The Court in that case was careful to point out that the whole aim

of the resolution was to affect a situation *entirely external* to the United States and falling within the category of foreign affairs. The Court said: (p. 319)

> ". . . In this vast external realm with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."

The resolution under consideration by the Court in that case was far different from "An Act to Create a Civil Aeronautics Authority and to Promote the Development and Safety, and to Provide for the Regulation of Civil Aeronautics", enacted under the Commerce Clause of the Constitution.

In the *Curtiss-Wright* case, *supra*, there was confided to the President "an authority which was cognate to the conduct by him of the foreign relations of the government". *Panama Refining Co.* v. *Ryan*, 293 U. S. 388. Such authority in origin and essential character is quite different from that over internal affairs, such as determining *which* United States citizen applicant may, under a law enacted pursuant to the Commerce Clause of the Constitution, engage in interstate, overseas or foreign air transportation.

The *Belmont* case, *supra*, has no remote application to the questions involved here. That case simply decided that an agreement between the United States and the Soviet Government, with respect to the settlement of claims and counterclaims between them, was valid, as against the asserted policy of the State of New York.

The Court in the *Pan American Airways* case, *supra*, and the Petitioners here, rely upon *United States* v. *Bush*, 310 U. S. 371, for the proposition that the President, and not the Board, is the ultimate arbiter under the law, and that the Board is acting as nothing more than the President's adviser. We presume, therefore, that they perceive some similarity between the certification provisions of the Civil Aeronautics Act and the proclamation provisions of

the Tariff Act. Even a casual examination and comparison of the provisions of these two laws will show that the powers conferred upon the Tariff Commission and the Civil Aeronautics Board, and the functions of the President under each of the Acts are entirely dissimilar.

The pertinent provisions of the Tariff Act [8] are contained in Title 19 U. S. C. Section 1336 relating to Presidential proclamations approving tariff rates. The terms and provisions of this section clearly demonstrate that the Court was entirely correct in its decision in the *Bush* case, *supra*, when it held that the functions of the Tariff Commission were purely advisory. Section 1336 of the Tariff Act provides that in "change of classification or duties," the Commission must first "investigate" differences in the cost of production; that in the course of the "investigation," the Commission "shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings"; that at the conclusion of the investigation the Commission shall "*report* to the President the results of the investigation and its findings"; that its report shall contain certain "statements" by the Commission with respect to *ad valorem* rates, etc., Subsection (c) of Section 1336 provides that, upon the completion of these findings, "The President *shall by proclamation* approve the rates of duty and changes in classification" specified in any *report* of the Commission under this section, if, in his judgment, such rates of duty and changes are "shown by such *investigation* of the Commission to be necessary to equalize such differences in costs of production." (Italics ours).

A comparison of the above provisions of the Tariff Act with the certification sections of the Civil Aeronautics Act shows a distinctly different statutory pattern. Clearly, the Tariff Commission advises, whereas, the Civil Aeronautics

[8] Tariff Act of 1930, 46 Stat. 701, 19 U. S. C. 1336.

Board ordains. The kind of an order that emerges from a hearing before a body with power to ordain is one that affects legal rights in a far different way than a report of a commission which merely investigates and advises. The certification sections of the Civil Aeronautics Act, show that the Board does not "report" or make "recommended findings" to the President. No machinery has been set up, as under the Tariff Act, for the President to "proclaim" the issuance of a certificate. Rather, the Civil Aeronautics Act bestows *solely* upon the Board the power to *make the findings* and *issue the certificates.*

Section 801 does not provide for any participation by the President in the issuance of the certificate. It merely states that the issuance of certain types of certificates "shall be subject to the approval of the President."

Thus, under the Civil Aeronautics Act, the Board is entrusted with the power of making the necessary findings of fact and the issuance of all orders and certificates pursuant thereto. In contrast, under the Tariff Act, the Commission is empowered only to report to the President, who, in turn, is given the power to issue a proclamation by which a change in rates investigated by the Commission is put into effect.

In *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, the Court specifically differentiated the history and procedure of the Tariff Commission from that of "the Interstate Commerce Commission when regulating the conduct or the charges of interstate carriers" (page 317).

III.

WHETHER THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER OF THE BOARD GRANTING THE CERTIFICATE, AND WHETHER THE BOARD ACTED ARBITRARILY IN DENYING WATERMAN'S MOTION TO REOPEN THE CASE TO RECEIVE FURTHER EVIDENCE, ARE QUESTIONS OF LAW WHICH ARE SUBJECT TO JUDICIAL REVIEW.

(a) The Question of Substantial Evidence.

It is argued by the Board that the judicial function does not extend to review of the Board's compliance with the requirements of Section 401 of the Act. The argument, if valid, would lead to absurd results. The Board, under the theory advanced by Petitioners, after a hearing, but without evidence to support its action, could cancel, suspend or revoke the certificate of an air carrier which had been operating in overseas or foreign air transportation for many years, thereby destroying its investments and its business, and could after a hearing, but again without evidence to support its action, grant a certificate to another carrier to operate over the routes for which the certificate had been cancelled, suspended or revoked.

The Board in this case found, and that finding was approved by the President, that the service authorized was required by the public convenience and necessity; it granted a certificate to a carrier that was unfit and unable to inaugurate such service and now it is contended that the courts may not inquire into whether the Board failed to comply with the law in granting the certificate. Aside from the express language of Section 1006(a), it cannot be seriously urged that the Congress intended to confer such unfettered power upon the Board subject only to the approval of the President.

The Congress, foreseeing such a situation as we have here, required that the Board make findings of fact, and provided that such findings must be supported by substan-

tial evidence if they were to form the basis of a valid order. It expressly provided for judicial review to make certain that the Board's orders were based upon the evidence and the law rather than upon arbitrary or extra-legal considerations.

In addition to these considerations, the provisions for review afford a judicial restraint upon the obtaining of certificates by misrepresentation or fraud or other illegal methods. The issuance of certificates of public convenience and necessity to an air carrier usually results in the payment of large sums from the public treasury in the form of compensation for the transportation of mail. No such element is present with respect to the issuance of permits to foreign air carriers by reason of the provisions of Section 406(f) of the Act. Therefore, the Congress provided that such permits issuable to foreign air carriers shall be approved by the President and shall not be subject to judicial review.

At the hearing in the *Latin American Case*, C & S submitted an exhibit showing, on the route sought to be served by it between New Orleans, Louisiana, and San Juan, Puerto Rico, an estimated annual profit before mail pay of some $435,000 (R. 373). The exhibit showed the estimated cost of operating DC-4 equipment over such route, upon an additional expense basis, to be 117.92c per mile[9] (R. 373). Its president testified that, on the basis of these estimates, C & S would be willing to undertake the operation of the service sought over said route with mail pay at the rate then received by it, namely, 60c per ton mile. This rate involves very little subsidy. (R. 374) Waterman had proposed to inaugurate and maintain a service between New Orleans and San Juan, supplemental to its steamship service, *without* mail pay. The Board has frequently held that it is important to ascer-

[9] The final exhibit offered by C & S on this point showed an estimated profit before mail pay of approximately $300,000 per annum, and an operating cost estimated at $1.28 per mile.

tain within reasonable limitations the cost to the Government of the proposed operation in the form of compensation for the transportation of mail, and that, unless exceptional circumstances exist in a given case, the relationship between estimated commercial revenues and operating costs of the proposed service should not initially impose upon the Government an unduly large proportion of the total operating costs. (*Pennsylvania Central Airlines Corp.*, 2 C. A. B. 207, and *Northwest Airlines, Inc.*, 1 C. A. A. 573). That the Board relied upon the representatives of C & S in this case, and that the Board's order granting the certificate of public convenience and necessity to C & S was based in substantial part upon this evidence, is shown in the Board's finding that: (R. 208)

> ". . . Although it is not likely that the New Orleans-San Juan service will require any substantial subsidy payment, especially if it is conducted as a part of an independent airline system, the considerations advanced by Waterman would carry substantial weight if Waterman alone were an applicant."

Moreover, the record shows that the Board in issuing its order granting the certificate of public convenience and necessity to C & S, relied upon the representation by C & S in its application that it was

> ". . . fit, willing, able *and ready to,* and is properly equipped, organized, staffed and financed, to properly perform adequate and safe air transportation services over said routes." (R. 3)

This is clearly demonstrated by the fact that the motion of Waterman to reopen the *Latin American* case to receive further evidence and for reargument, was denied by the Board upon the ground, among others (R. 21):

> "2. That evidence related to air traffic during the war period and the present transition period does not form a sufficient basis for an estimate of future air traffic to warrant the reopening of this proceeding,

particularly in view of the delay which would result and which would interfere with the institution of new services to Puerto Rico and other points, and that it is in the public interest to issue as promptly as possible a decision in this proceeding . . .".

Even now C & S in its brief (p. 43) urges that the reason for the rule of the Board to the effect that no petition for rehearing shall operate as a stay of the effective date of the order sought to be modified or vacated by the petition, unless so ordered by the Board, is that certificates of public convenience and necessity are awarded to fill special needs. "In a great many instances" argues C & S (Brief, p. 43) "the need is a matter of emergency. It is, therefore advisable, if not imperative, that the legal delays requisite to due process be cut to a minimum to assure the public the earliest possible service. It is conceivable that the inauguration of service might be endlessly postponed by the dilatory tactics of an opponent to an award." In view of the representations upon which C & S obtained its certificate from the Board in this case, and events which followed almost immediately following the issuance of the certificate, that argument is sheer sophistry.

The order granting the certificate of public convenience and necessity to C & S, and the order denying Waterman's Motion to Reopen the Proceeding to Receive Further Evidence were served on Waterman May 24, 1946. On June 10, 1946, less than three weeks later, C & S filed with the Securities and Exchange Commission a prospectus relating to the sale of 170,000 shares of common stock voting trust certificates in which the following statement appears: (R. 366)

> "The company, however, can make no prediction either *with respect to the time within which operations will commence along these new Caribbean routes* or with respect to the time when operation over such routes will be profitable." (Italics ours)

On October 11, 1946, C & S filed with the Board a "Petition for Establishment of Mail Rate" (R. 375) in which it represented that the estimated cost of operating DC-4 equipment on the New Orleans-Havana segment of the route which had been awarded to it, would amount to—not 128 cents per mile, as it had represented when seeking the certificate—but to 286.88 cents per mile; that it would require a total mail pay—not of 60 cents per ton mile as it had represented when seeking the certificate—but of 173 cents per airplane mile (R. 383). C & S, in such petition, alleged further (R. 378, 379):

> "... that unless a temporary rate of compensation for the transportation of mail is fixed shortly after the inauguration of service over said segment of its foreign route, Petitioner, in view of the operating expenses applicable to the operation of its routes, the expenditure of funds required for the purchase of new equipment, and the facilities related thereto, will be compelled to seriously impair its working capital; ..."

Notwithstanding the representations of C & S made to induce the Board to grant it a certificate and the urgency with which the Board viewed "the institution of new services to Puerto Rico and other points" in denying Waterman's Motion for Reopening the Proceeding to Receive Further Evidence, services have not yet been inaugurated by C & S beyond Havana, because, as Waterman alleged in its motion, C & S was not fit, willing and able to perform the proposed services as required by Section 401 of the Act.

It clearly appears from the record before this Court that, during the pendency of the motion of Waterman to reopen the proceeding, and at the very moment that C & S was opposing said motion and asserting that "Chicago and Southern has amply demonstrated that it is fit, willing and able to provide any services authorized for this company in this proceeding" (R. 111), it had in preparation, for filing with the Securities and Exchange Commission,

a prospectus in which it admitted its inability to commence the service for which it had applied.

This review shows clearly that the facts with respect to the inability to inaugurate the authorized service were known to the Board at the time it denied Waterman's Petition for Rehearing, by its Order Serial No. 4977, dated July 12, 1946. It also showed that C & S at the time the Certificate was issued, was aware of the fact that it could not inaugurate and maintain the service on the basis of the representations made by it to the Board at the time of the hearing. Therefore, it must be concluded that (a) C & S obtained the certificate upon the basis of gross misrepresentation and without substantial evidence to support the Board's findings, or (b) that conditions with respect to the traffic potential as represented by C & S, the operating revenues and expenses as represented by it, its financial ability to inaugurate and maintain the proposed service, and the rate of compensation for the transportation of mail which would be required by it, had changed so drastically that the record made in 1944 could furnish no adequate basis for the action of the Board in May, 1946.

Either or both of these propositions present a question of law as to whether the Board complied with the requirements of the statute in its decision and order granting the certificate to C & S, and whether it acted arbitrarily in denying Waterman's motion to reopen the case, and its petition for a rehearing.

As stated by Mr. Landis, Chairman of the Board, on March 3, 1947, in an opinion in C. A. B. Docket No. 2564, Serial Number E-337, "It is difficult to believe that the Board would have certificated this route had the present estimates been those upon which Chicago and Southern sought the application."

The observation of Chairman Landis is particularly significant in the light of one of the reasons assigned by

the Board for denying Waterman's Motion to Reopen the Proceeding to Receive Further Evidence (R. 21):

> "(5) that the cost of new air services in the form of air mail compensation is only one of the facts considered by the Board in certificating such services, and . . . the amounts of such compensation paid in the past and required in the future by other applicants were facts known at the hearing and considered by the Board."

(b) The Question of Changed Conditions.

In this case, the allegations of changed conditions upon which Waterman's petition to reopen the *Latin American* case was based no longer need depend upon general assertions of drastic changes in world affairs as evidenced by facts of which the Court may take judicial notice. Here we have the formal opinions of the Civil Aernonautics Board itself that conditions had so drastically changed as to warrant an attempt by it to justify the failure of C & S to inaugurate the service authorized by the certificate sought to be reviewed, and a complete disregard of the representations made to the Board by C & S in order to obtain the certificate.

On March 3, 1947, the Board, by its Order Serial No. E-337, fixed a base rate of 95 cents per airplane mile as the temporary rate of compensation to be paid to C & S on the New Orleans-Havana segment of the San Juan route.

In the opinion concurring in the issuance of such Order, Mr. Ryan, Vice-Chairman of the Board, stated (Order Serial No. E-337, Docket No. 2564, dated March 3, 1947):

> "The carrier has asked for a mail rate on the New Orleans-Havana segment of its Caribbean route *substantially in excess of that anticipated at the time of the decision in the Latin American case in which this route was awarded.*"

• • • • • • •

"While the present costs on the New Orleans-Havana route appear to be substantially higher than those estimated at the time the service was authorized, they certainly are not higher than those experienced by our pioneer carrier in the Caribbean during the initial period of its operation." (Italics ours).

On the same date, March 3, 1947, the Board, by its Order Serial No. E-338, in C. A. B. Docket No. 2834, instituted a proceeding to determine whether any portion of the Latin American route awarded to C & S should be suspended.

Mr. Branch, a member of the Board, in an opinion concurring in that Order, stated (Order Serial No. E-338, Docket No. 2834, dated March 3, 1947):

"The disparity between the anticipated costs to the Government through mail payment at the time the route was certificated and the amounts now estimated to be required to enable the carrier to operate the service is so great as to pose the problem whether the public need for the service at this time is sufficient to justify the financial burden which inauguration of the service will impose upon the Government." (Italics ours).

. . . . . .

"In its opinion in the Latin American Case, Docket No. 525, the Board stated that it was not likely that the New Orleans-San Juan service would require any substantial subsidy payment especially if conducted as a part of an independent airline system. During the period intervening between our decision in that case and the inauguration by Chicago and Southern of its international service between New Orleans and Havana a number of adverse economic factors have developed, not only with respect to this carrier but with respect to the industry generally. There has been a very substantial increase in costs. In addition, in some instances carriers over-estimated their equipment needs and personnel requirements. . . . (Italics ours).

"Not only have these adverse factors affected to a substantial degree the Chicago and Southern Carib-

bean operation but they have also affected its domestic operation, thus augmenting the strain upon the carrier's financial condition."

Mr. Lee, a member of the Board, in an opinion dissenting from the decision to order such investigation, stated (Order Serial No. E-338, Docket No. 2834, dated March 3, 1947):

> "*A major difference between the situation when the Board originally certificated these routes and the present situation is a general increase in the price level in materials and services with no corresponding increase in rates.* The cost of all materials and services has increased to the extent that a comparison between the revenues of the carrier from rates, which have been held at the same level as they were when the certificates were originally issued, and the costs, which have increased considerably, presents a darker picture than that presented to the Board in its original decision." (Italics ours).

Chairman Landis, in an opinion dissenting from the Board's Order of March 3, 1947, fixing a temporary mail rate on the New Orleans-Havana segment of the route authorized by it, reviewed at length the conditions which existed and the representations of C & S with respect to costs of operation and mail pay required when seeking the certificate, as compared with conditions which existed and the representations of C & S after the certificate was issued. He said (Order Serial No. E-337, Docket No. 2564, dated March 3, 1947):

> "Prior to inauguration of any service by Chicago and Southern that carrier on October 11, 1946, applied to the Board for the establishment of a provisional rate of mail compensation of $1.73 per airplane mile. This petition was amended on November 14, 1946, to increase the requested rate to $2.17 per airplane mile for the Havana segment the petitioner alleging that certain miscalculations had been made to its dis-

advantage in the original petition. On January 28, 1947 the Board issued an order to show cause why it should not fix a temporary rate of 50c per airplane mile for the carrier's entire international route. This rate was admittedly not based on operating costs of this carrier but was a temporary measure fixed by reference to the highest rates theretofore established by the Board for substantially similar service in the Caribbean area. On February 6, 1947, Chicago and Southern petitioned for reconsideration of this temporary rate order. It still asked for $2.17 per airplane mile for the New Orleans-Havana segment, which is the only one now in operation, and for $1.64 per airplane mile when the service was extended beyond Havana to San Juan."

• • • • • • •

"These per airplane mile figures to the uninitiated give little sense of the overall costs of the operation. But, as translated by Chicago and Southern its estimate for mail pay for the New Orleans-Havana segment would be about $750,000 per year for one daily DC-4 round trip over that route. Extending this operation to San Juan would, according to their estimates, cost the Government in mail pay about $1,800,000 per year and, extending it to Caracas gave a total mail pay estimate of $3,400,000. These estimates are based upon their latest requests and upon a load factor of between thirty and forty per cent, seemingly considerably in excess of the latest reported traffic, which reflects the peak season on this route and which is likely to fall off during the summer months.

"*These estimates are in striking contrast to those originally submitted by Chicago and Southern during the Latin American case.* The estimates of revenues and direct costs on the international route then put into the record, after allowance for allocation of system costs as claimed by Chicago and Southern in its mail rates petition, reflect a break-even need of 19c per plane mile for DC-4 equipment and 22c for DC-3 equipment. Chicago and Southern, however, through its president contended that it could fly the route with merely compensatory mail pay, presumably 60c per ton mile, the rate then in effect throughout its domes-

tic system. In passing it can be observed that the mail actually being carried on this route is exceedingly light, *and that under the rate of $1.77 requested by the carrier the cost to the Government of carrying this mail would be over $700 per ton mile.* (Italics ours).

"Though the Board in dealing with applicants' estimates as to costs and mail pay required to fly any route must necessarily be morosely sceptic, the general level of original estimates unquestionably has an influence with the Board. This was true in the Latin American case. There, in selecting Chicago and Southern as the carrier for this route in preference to another applicant the Board stated: 'Although it is not likely that the New Orleans-San Juan service will require any substantial subsidy payment especially if it is conducted as a part of an independent airline system . . .' P. 58.

"It is difficult to believe that the Board would have certificated this route had the present estimates been those upon which Chicago and Southern sought the application."

* * * * * * *

". . . Chicago and Southern's costs for DC-4 operation seem extraordinarily high. Originally they stood at $2.80 per mile; as revised they come to $2.62. The average costs after allowing for an allocation of ground and indirect costs for all DC-4 international operators is only $2.48 per revenue plane mile. This includes operations over such routes as the North Atlantic where costs are necessarily higher because of the necessity for relief crews and other matters. A more appropriate comparison is DC-4 costs of all domestic operators that stand at $1.48 per revenue plane mile. The operation from New Orleans to Havana, apart from gasoline taxes charged by Cuban authorities and the landing fees paid to Pan American in Havana, is of a nature that should compare with these. But it almost doubles them.

"Again, Chicago and Southern is in difficulty with regard to its domestic operations. Domestically it seeks mail pay which would aggregate almost $4,000,000 as against some $215,000 it received during the past year. It further states in a petition filed with

the Board on December 20, 1946, that unless some temporary relief is forthcoming it 'will be without cash funds sufficient to carry on operations on or about February 1, 1947.' If its allegations be accepted as true, Chicago and Southern, irrespective of such action as may be taken on its international route, is threatened with bankruptcy because of its domestic operations unless very substantial and immediate relief in the form of mail pay is forthcoming. To permit it to continue operations on an international route which to all appearances can only be a constant drain on its already weakened resources seems a highly questionable policy for it to pursue or for the Board to permit it to pursue. Bankruptcy of a carrier engaged in international operations does not enhance the prestige of the United States. Nor does it seemingly discharge those high responsibilities placed upon carriers certificated to carry the American flag abroad."

* * * * * * * * *

"In the award of routes the Board is governed by considerations dealing with the public convenience and necessity. The need for a service, the traffic potentials, probable costs of the service and many other factors enter into that conclusion."

* * * * * * * * *

"Of course, initial costs, higher than anticipated, should not be necessarily lead to the conclusion that an original award was erroneous, but the situation seemingly presented here gives no assurance of foreseeable improvement. Contrariwise, the carrier has assured us that the costs it has projected are not likely to be reduced but may increase. Optimism under these circumstances seemingly has an insecure foundation."

These statements of members of the Board show that at the time the Board denied Waterman's motion to reopen the Latin American case, conditions had changed to such an extent as to bring the motion within the principle of *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States, supra.*

Thus, it is clear from the record made by the Board itself that while there is a public need for an air transportation service between New Orleans, Louisiana, and San Juan, Puerto Rico, the areas served by these gateways are being deprived of such service by reason of the fact that the Board granted a certificate to an applicant which on the basis of the facts did not meet the test of fitness, willingness and ability to perform the transportation services authorized by the certificate, as required by law.

It is respectfully submitted that the very purpose of judicial review of the Board's orders is to prevent the granting of certificates in cases such as we have here.

IV.

"CASE" OR "CONTROVERSY"

The Petitioners here assert that because of Section 801 any judgment rendered by the Court would be without finality and conclusiveness because the President is authorized to approve or disapprove subsequent action which might be taken by the Board in conformity with the Court's decision. This amounts to an argument that the Board may, as it has done here, grant a certificate to an air carrier without regard to the requirements of the statute and because the President approves the Board's order granting the certificate, judicial review would be futile because the Board and the President might again reach the same conclusion.

Such an argument is utterly without merit. It is perfectly possible that upon demand the Board will come to the same conclusion as it did in the first instance, as it is possible in almost any case of review of the decision of a board or commission. But that fact does not nullify the power of the courts to review actions of an administrative agency. Certainly no greater futility could be imagined than for the Board to determine that a public need existed for an air transportation service and, in disregard of the

law, to certify a carrier which is unfit and unable to inaugurate and maintain the service. The public convenience and necessity is the primary test as to whether an air transportation service shall be inaugurated. In this case the public is being deprived of a needed service because of the Board's arbitrary action in certifying an unfit carrier, in disregard of statutory requirements, and the argument that the courts may not review the Board's determination for the reason that it may again reach the same conclusion is wholly untenable.

The law is well established that such fact does not deprive the courts of the power to review actions of an administrative agency.

The provisions of the Civil Aeronautics Act with respect to judicial review are similar to those of the Federal Trade Commission Act.[10] The language of the Court in *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co., supra,* is in point (p. 276):

> "... Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are apppropriate questions for judicial decision. These are questions of law upon which the Court is to pass."

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[10] Act of September 26, 1914, c. 311, 38 Stat. 719, 43 Stat. 939, 52 Stat. 111, 52 Stat. 1028, 15 U. S. C. 45.

The argument advanced by Petitioners here is almost identical with one rejected by the Court in *Federal Power Commission* v. *Pacific Power and Light Co., et al.*, 307 U. S. 156. The Federal Power Commission in that case contended that an order denying an application of a public utility for permission to sell its assets was not reviewable because only the Commission, and not the Court, could relieve from the statutory prohibition. The Court in that case used language which clearly supports our position: (pp. 159, 160)

"But it is urged that review of the Power Commission's order does not present a 'Case' or 'Controversy,' because the court itself cannot lift the prohibition of the statute by granting permission for the transfer, nor order the Commission to grant such permission. And so it is claimed that any action of a court in setting aside the order of the Commission would be an empty gesture, since without permission a transfer would be unlawful. But this proves too much. In none of the situations in which an action of the Interstate Commerce Commission or of a similar Federal regulatory body comes for scrutiny before a Federal court can judicial action supplant the discretionary authority of a commission. A federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices. *So here it is immaterial that the court itself cannot approve or disapprove the transfer. The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. '. . . a judgment rendered will be a final and indisputable basis of action between the commission and the defendant.' Interstate Commerce Comm'n v. Baird,* 194 U. S. 25, 38, 48 L. ed. 860, 866, 24 S. Ct. 563. *In making such a judgment the court does not intrude upon the province of the Commission, while the constitutional requirements of 'Case' or 'Controversy' are satisfied.* For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so." (Italics ours.)

Petitioners contend that the Court, if it reviews the orders, would be without power to render a judgment with finality and conclusiveness because the President nevertheless would be required to approve or disapprove subsequent action by the Board. It is equally true that Congress might decline to appropriate funds to satisfy judgments of the Court of Claims, but that hypothetical possibility could not render the Court of Claims' actions beyond the scope of judicial power. *United States* v. *Jones*, 119 U. S. 477. As pointed out by the Court below, "Courts try criminal cases notwithstanding an executive pardon may frustrate a conviction. They constantly reach conclusions in all kinds of cases undeterred by the chance that a higher court may disapprove their orders." (R. 412).

The reasoning in the *Pacific Power* case, *supra*, is directly in point. A decision by the Court that the Civil Aeronautics Board construed the statute erroneously or made findings unsupported by the evidence will be "a final and indisputable basis of action" as between the Respondent here and the Board. The Constitutional requirement of "case" or "controversy" is only that there shall be a real issue between the parties which the Court is in a position to settle. There can be no doubt but that there is a real issue between the Petitioners here and Waterman, which the Court is in a position to settle with complete finality. (*Maryland Casualty Co.* v. *Pacific Coal and Oil Co.*, 61 S. Ct. 510, 312 U. S. 270; *Nashville, C. & St. L. Railway Company* v. *Wallace*, 288 U. S. 249; *Gully* v. *Interstate Natural Gas Company, Inc.*, 82 F. (2d) 145 (C. C. A. 5th); *Columbian National Life Insurance Company* v. *Foulke*, 89 F. (2d) 261 (C. C. A. 8th).

As already stated, the Act prescribes that certificates authorizing overseas and foreign air transportation shall be issued by the Board and not by the President. True, such certificates are subject to the approval of the President. This does not mean that the President has power to determine which carrier shall be certificated for overseas

air transportation. That determination is made by the Board, for only it can determine whether a particular applicant has complied with the legislative standards set up by Congress.

An issue is clearly raised by the allegation that the Board's order granting the Certificate to C & S was without substantial evidence. The conflicting contentions of the parties here present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. A "case or controversy" is before this Court. *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, and cases therein cited. *Re Clyde Wilson Summers*, 325 U. S. 561.

The Court stated in *Federal Radio Commission* v. *Nelson Bros. Co., supra:* (p. 278)

> "'It is not important,' we said in *Old Colony Trust Co.* v. *Commissioner of Internal Revenue, supra*, 'whether such a proceeding was originally begun by an administrative or executive determination, if when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.' Nor is it necessary that the proceeding to be judicial should be one entirely *de novo*. *When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the Commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power.* The provision that, in case the Court reverses the decision of the Commission, 'it shall remand the case to the Commission to carry out the judgment of the Court' means no more than that the Commission in its further action is to respect and follow the Court's determination of the questions of law. The procedure thus contemplates a judicial judgment by the Court of Appeals and this Court has jurisdiction, on certiorari, to review that judgment in order to determine whether or not it is erroneous. (Citing cases.)" (Italics ours).

In the present case, it is clearly demonstrated that the Board acted outside the scope of its authority by its finding that C & S was fit, willing, and able to perform the services authorized.

It is well established that under such circumstances the Court has jurisdiction to review errors of law outside the Board's final say so. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939).

V.

THE PETITION FOR REVIEW WAS TIMELY.

C & S urges that Waterman has lost any right to a review of the decisions and orders of the Board for the reason that the Petition was not filed within sixty days of the date of the orders granting the certificate and denying Waterman's Motion to Reopen the Proceeding to Receive Further Evidence. It is well established by the decisions that the courts cannot be resorted to for the adjudication of an administrative question, the determination of which has not been completed by an agency having jurisdiction of it for that purpose. *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477; *Southland Industries* v. *Federal Communications Commission*, 99 F. (2d) 117. There is no principle of administrative law that is better settled than the rule that no review may be had until administrative remedies have been exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540.

The rules of the Board provide that (R. 343):

> "Any party may petition for rehearing, reargument, or reconsideration of any final order by the Board in a proceeding, or for further hearing before decision by the Board.
>
> "The matters of record claimed to have been erroneously decided must be specified, and the alleged errors, and the grounds relied upon must be briefly and specifically stated in the petition."

The latter provision of the rules is in conformity with the provisions of Section 1006(e) that "no objection to an order of the Authority shall be considered by the court unless such objection shall have been urged before the Authority . . .".

The only method by which such objections to an order of the Board may be urged before the Board is by a petition for rehearing, after the order has been entered.

Moreover, the rule is well settled that the filing of a petition for rehearing will suspend the running of the period within which an appeal may be taken or petition for review may be filed, and that this period then begins to run anew from the date on which final action is taken by the administrative agency having jurisdiction of it for that purpose. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131; *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554.

The Board in this case did not complete final action upon the questions before it until the order denying Waterman's Petition for Rehearing. In fact, in the same order, Serial No. 4977, the Board ordered that the proceeding be reopened for the purpose of further argument before the Board and reconsideration by it of its order of May 17, 1946, Serial No. 4793, with respect to (a) the denial of the applications of Colonial Air Lines, Inc., Eastern Air Lines, Inc. and National Air Lines, Inc., insofar as they proposed through service between Balboa, C. Z. and cities in the eastern part of the United States via certain intermediate points, and (b) the denial of the applications of Pan American Airways, Inc. insofar as they proposed service to Curacao, N. W. I. on its Miami-Caracas route, and at Havana, Cuba, on its Miami-Kingston-Balboa route.

The Board might have granted the petition of Waterman for a rehearing by the same order. Therefore, the administrative process was not completed until the Board disposed of Waterman's motion. There was no final order of the Board in this case until July 12, 1946, when it re-

opened the case for the purposes stated above and denied Waterman's petition for reconsideration.

The precise question raised by C & S was before the court in *Braniff Airways, Inc.* v. *Civil Aeronautics Board (Essair Inc. Intervenor)*, *supra*. The contention now urged by C & S was rejected. The court stated (page 153):

> "Essair contends that the order was not stayed, and that it was therefore necessary to file the petition within sixty days of the date of the order. But we cannot review an order until administrative remedies have been exhausted. For purposes of review, therefore there was no final order until the rehearing was denied. (Citing case.) It follows that the present petition was timely."

That decision is in accord with the purpose in authorizing the Board to provide the administrative remedy of a rehearing. The object of statutes or rules providing for or authorizing petitions for rehearing is to afford opportunity to administrative agencies to correct errors or to hear newly discovered evidence before a review. If the statute here be construed so that a petition for rehearing does not suspend the running of the statutory period for filing a petition for review, the administrative benefit to the Board of such petitions may well be destroyed and its rules with respect thereto nullified.

The cases relied upon by C & S, *United States* v. *Abilene & S. R. Co.*, *supra*, and *Levers* v. *Anderson*, 326 U. S. 219, are not authority for the proposition asserted by it. These cases merely hold that under the circumstances there it was not necessary to file a petition for rehearing before resort was had to the courts. Therefore, under the decisions the contention of C & S that Waterman's Petition for Review was not filed in time must be rejected.

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

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No. 1371

In the Supreme Court of the United States

OCTOBER TERM, 1946

CIVIL AERONAUTICS BOARD, PETITIONER

v.

WATERMAN STEAMSHIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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742966—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. ——

CIVIL AERONAUTICS BOARD, PETITIONER

v.

WATERMAN STEAMSHIP CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General on behalf of the Civil Aeronautics Board prays that a writ of certiorari be issued to review a judgment of the Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled case on February 14, 1947, denying petitioner's motion to dismiss a petition for review filed by respondent Waterman Steamship Corporation.

OPINIONS BELOW

The opinion of the court below is reported in 159 F. 2d 828 (R. 407). The opinion of the Civil Aeronautics Board is reported in 6 C. A. B. 857 (R. 118).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 14, 1947 (R. 413). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an order issued by the Civil Aeronautics Board granting and denying applications for certificates of public convenience and necessity to engage in overseas and foreign air transportation is subject to judicial review when such order has been approved by the President of the United States pursuant to the provisions of Section 801 of the Civil Aeronautics Act.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] which will be referred to as the Act, are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

In December 1940 Waterman Airline, Inc., a subsidiary of respondent, filed an application with the Civil Aeronautics Board seeking a certificate of public convenience and necessity under Section 401 of the Act to engage in air transportation between the United States and Puerto Rico (R. 42). Subsequently amended applications were filed, one of which substituted respondent as the applicant (R. 95, 96). Chicago and Southern Air

[1] Act of June 23, 1938, c. 601, 52 Stat. 977, 54 Stat. 1233, 54 Stat. 1235 (49 U. S. C. 401, *et seq.*).

Lines, Inc., also filed an application with the Board which, as later amended, sought a certificate to engage in air transportation over various routes in the Caribbean, Central and South American areas, including a route between New Orleans, Louisiana, and San Juan, Puerto Rico, via certain specified intermediate points (R. 3–4, 232).

The Board consolidated for hearing under Docket No. 525 *et al.*, entitled "Additional Service to Latin America," the applications filed by 15 applicants (including those filed by respondent and by Chicago and Southern Air Lines, Inc.) seeking certificates of public convenience and necessity to engage in air transportation between the United States and points in Mexico, Central and South America, and the Caribbean area (R. 124–125). Prior to hearing copies of the various applications were transmitted to the President of the United States as required by Section 801 of the Act (R. 124). After hearings had been completed, the Board prepared an opinion and a proposed order granting and denying certificates of public convenience and necessity. Pursuant to Section 801, the decision of the Board, consisting of its opinion and proposed order and certificates, was submitted to the President for his approval (R. 125).

The proposed disposition of the applications was disapproved in part by the President, and

the Board's opinion and proposed order and certificates were returned to it for further action in conformity with the President's directions (R. 125).

An amended opinion and proposed order and certificates revised to reflect the desires of the President were again submitted to him and the President approved this revised disposition of the applications on May 22, 1946 (R. 263). The Board then published its opinion (R. 118) and the order signed by the President (R. 256). Included among the applications denied by this order was that of respondent (R. 263). The certificate granted to Chicago and Southern Air Lines, Inc. was approved on May 22, 1946 (R. 269–271).

After the Board had denied its application for rehearing and reconsideration (R. 328–330), respondent filed a petition in the court below seeking review of the Board's action (R. 1–9). The Board filed a motion to dismiss for lack of jurisdiction, or in the alternative to affirm (R. 27). Chicago and Southern intervened and filed a similar motion (R. 360, 388). By leave of court the motions were heard on an abbreviated record containing the applications, orders, and related documents pertinent to the jurisdictional issues raised (see R. 408).

The court below denied the motions to dismiss, holding that it had jurisdiction to review under Section 1006 (a) of the Act notwithstanding the

approval of the President, which the court stated it had "no power to question or review" (R. 411). The court also stated that it was aware "that this question was decided otherwise" by the United States Court of Appeals for the Second Circuit in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810 (*ibid.*).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that orders issued by the Civil Aeronautics Board after approval by the President of the United States pursuant to Section 801 of the Act are subject to judicial review under Section 1006 (a) of the Act.

(2) In holding that it has jurisdiction to review an order upon which it cannot render a judgment with finality and conclusiveness.

(3) In failing to grant the motion to dismiss filed by the Civil Aeronautics Board.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is admittedly in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. 2d 810.[2] This conflict should be resolved by this Court.

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[2] In the *Pan American* case, the court said (pp. 813–814):

> But it does not follow merely from the broad language of Section 1006 (a) that there may be a review of orders

2. The decision of the court below presents a question of importance in the administration of the Civil Aeronautics Act which has not been, but should be, determined by this Court. The issue is one which will arise in every proceeding to review an order granting or denying a certificate to engage in overseas and foreign air transportation. The public interest will be promoted by prompt settlement of the question by this Court.

3. The petition should be granted at this stage in the proceeding because the judgment sought to be reviewed is final on the question of jurisdiction. A conflict between circuit courts of

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for the issuance of certificates which the President shall approve or disapprove under Section 801, 49 U. S. C. A. § 601. * * *

* * * * *

It seems clear that in approving or disapproving of certificates of public convenience and necessity the President must frequently act on information which was not before the Board and may even have become available to him after the Board has taken its testimony and granted the certificates. There is nothing in the act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, and not the Board, the ultimate arbiter. *United States* v. *George S. Bush & Co.*, 310 U. S. 371, 60 S. Ct. 944, 84 L. Ed. 1259.

If the President has approved of a certificate authorizing a carrier to engage in foreign air transportation and we should attempt to review the order authorizing the issuance of the certificate, we would be placed in a

appeals and the importance of the issue raised by denial of a motion to dismiss moved this Court to grant certiorari before judgment on the merits in *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. Although the judgment below is not final on the merits, it is appropriate for review where, as here, it presents an issue "fundamental to the further conduct of the case." *Land* v. *Dollar*, No. 207 this Term, slip op. 2, decided April 7, 1947; *United States* v. *General Motors Corp.*, 323 U. S. 373, 377. No useful purpose would be served in allowing the court below to conduct a hearing on the merits

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position where we might be obliged to reverse a tribunal whose subsequent action the President would decline to approve. His sweeping powers are illustrated by the fact that under Section 801 he is obliged not only to approve or disapprove of a certificate for foreign air transportation, but even to approve or disapprove of the denial of such a certificate by the Board. It seems incredible that in enacting Section 1006 (a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and even of the denial of them, would necessarily render our review futile. *United States* v. *Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in Executive discretion that it cannot be regarded as authorized by Section 1006 (a). Accordingly the motion to dismiss the appeal is granted * * *.

involving the printing and consideration of a voluminous record if that court has no jurisdiction to entertain the proceeding.

4. The decision below is in conflict with applicable decisions of this Court concerning the scope of judicial power. The court below conceded that Congress has given the President "what amounts to an absolute veto as to all orders of the Board respecting all the matters named in Sec. 801" and that this veto power "would persist as to any modification of such an order by the court under Section 1006 (c) or any new order framed by the Board under direction of the court" (R. 411). The court further said that it had "no power to question or review either the approval or disapproval of the President" and that "he does not have even to state his reasons" for approval or disapproval (*ibid.*). The court thus recognized that it could not render a judgment having finality and that any judgment which it might render would necessarily be advisory and subject to revision by the President. As the court said in the *Pan-American* case, *supra*:

> There is nothing in the act to show that in granting certificates of public convenience and necessity the Board is acting as anything more than the President's adviser. His necessary approval or disapproval makes him, and not the Board, the ultimate arbiter.

Article III, Section 2, of the Constitution of the United States provides that the judicial power

shall extend to cases and controversies. It has long been established that courts created under this Article have no jurisdiction to enter a judgment which is merely advisory and which is not final and conclusive upon the rights of the parties.[3] It is also settled that a judgment is of this character if, as in the present case, it is subject to revision by the executive or legislative branches of the Government.[4]

The required action by the President on application for certificates authorizing overseas and foreign air transportation calls for exercise of discretion of a plenary nature in the field of international relations and in aid of national defense. Where questions of this nature overlap regulation of commerce with foreign nations, Congress may, as it has in Section 801, entrust the entire matter to the President.[5] See *United*

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[3] *Hayburn's Case*, 2 Dall. 408; *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U. S. 697, 702–704; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401.

[4] Cases cited in note 3.

[5] The record of the *Latin American* proceeding, as disclosed in the Board's opinion, forcibly illustrates the impact and finality of presidential action. In rejecting the Board's disposition of certain particulars in the *Latin American* case, the President advised the Board that because of certain factors relating to our broad national welfare and other matters for which the President has special responsibility, he had reached conclusions which required the certification of two routes which the Board did not find justified on the basis of the record before it, the certification of another route to a particular carrier designated by the President,

States v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318–324.

The court below was of the opinion that the Board's action is not final until the Board and the court have completed their functions and that *thereafter* the completed action must be approved by the President (R. 411). But Section 801 expressly directs the Board not to make public any action respecting applications for overseas and foreign air transportation until after presidential approval. Accordingly there can be no judicial review of Board action until *after* approval by the President and publication in accordance with his directions.

It is the Government's position that Section 1006 (a), interpreted in the light of the statute as a whole and applicable constitutional principles, does not authorize judicial review of Board action which can be taken only in conformity with approval given by the President. It does not seem necessary to elaborate further on the question of statutory construction at this time.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

MAY 1947.

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and the award of a certificate to a carrier other than the one proposed by the Board on the basis of evidence submitted to it. (R. 125.)

APPENDIX

Civil Aeronautics Act of 1938 as amended:

SECTION 1. As used in this Act, unless the context otherwise requires—

* * * * *

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation * * *

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(21) * * * "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

* * * * *

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof,

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * * *

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * *.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and

necessity; otherwise such application shall be denied.

* * * * *

SEC. 801. The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof * * *

* * * * *

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

* * * * *

(d) Upon transmittal of the petition to the Board, the court shall have exclusive juris-

diction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. * * *

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

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BRIEF FOR THE CIVIL AERONAUTICS BOARD

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The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 159 F. 2d 828 (R. 407). The opinion of the Civil Aeronautics Board is reported in 6 C. A. B. 857 (R. 118).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 14, 1947 (R. 413). The petition for a writ of certiorari was filed on May 13, 1947, and was granted on June 16, 1947.[1]

[1] A petition for a writ of certiorari also was filed by Chicago and Southern Air Lines, Inc., intervenor, on May 6, 1947, and was granted June 16, 1947.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 347.

QUESTION PRESENTED

Whether an order issued by the Civil Aeronautics Board granting and denying applications for certificates of public convenience and necessity authorizing American air carriers [2] to engage in overseas and foreign air transportation is subject to judicial review when such order has been approved by the President of the United States pursuant to the provisions of section 801 of the Civil Aeronautics Act.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[3] which will be referred to as the Act, are set forth in the Appendix, *infra*, pp. 66–73.

STATEMENT

On December 19, 1940, Waterman Airline, Inc., a subsidiary of respondent, filed with the Civil

[2] The terms "air carrier" and "air transportation" referred to herein are defined in subparagraphs (2), (10), and (21) of section 1 of the Civil Aeronautics Act of 1938, as amended. These and other pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 66–67.

[3] Act of June 23, 1938, c. 601, 52 Stat. 977, 54 Stat. 1235 (49 U. S. C. 401, et seq.).

Aeronautics Board[4] an application seeking a certificate of public convenience and necessity under Section 401 of the Act to engage in air transportation between the United States and Puerto Rico (R. 42). Subsequently, amended applications were filed, one of which substituted respondent as the applicant (R. 95, 96). Chicago and Southern Air Lines, Inc., also filed an application with the Board on October 5, 1942, which, as later amended, sought a certificate to engage in air transportation over various routes in the Caribbean, Central and South American areas, including a route between New Orleans, Louisiana and San Juan, Puerto Rico, via certain specified intermediate foreign points (R. 3–4, 232).

Thereafter the Board consolidated for hearing under Docket 525, et al., entitled *Additional Service to Latin America*, a total of twenty-nine applications filed by fifteen applicants (including those filed by respondent and Chicago and Southern Air Lines, Inc.) seeking certificates to engage in air transportation between the United States and points in Mexico, Central and South America, and the Caribbean Area (R. 124–125, 231–241).

---

[4] Reorganization Plan No. IV, 5 F. R. 2421–2423, which became effective on June 30, 1940, reassigned the duties and functions of the "Civil Aeronautics Authority" under the Act in terms of the "Civil Aeronautics Board" and the "Administrator of Civil Aeronautics." Petitioner will be referred to herein either as the "Civil Aeronautics Board" or the "Board."

Prior to hearing, copies of the various applications were transmitted to the President of the United States as required by Section 801 of the Act (R. 124). After due notice, public hearings were held before examiners of the Board from September 18 to October 13, 1944. Briefs to the examiners were filed on December 14, 1944, and the examiners' report was served on all parties on March 5, 1945. Exceptions and briefs to the Board in support thereof were filed on March 20, and April 23, 1945, respectively, and oral arguments by the fifteen applicants and ten intervenors were heard by the Board from April 30, 1945 to May 5, 1945 (R. 124–125).

At the conclusion of its deliberations, the Board prepared an opinion and a proposed order granting and denying applications for certificates. Pursuant to Section 801, the decision of the Board, consisting of its opinion and proposed order and certificates, was submitted to the President for his approval (R. 125). The proposed disposition of the applications was disapproved in part by the President, though not with respect to the route here involved, and the Board's opinion, proposed order and certificates were returned to it for further action in conformity with the President's directions (R. 125).

An amended opinion and proposed order and certificates, revised to reflect the desires of the President, were again submitted to him, and the

President approved this revised disposition of the applications on May 22, 1946 (R. 263). The Board then published its opinion (R. 118) and the order as approved by the President (Order Serial Number 4793, dated May 17, 1946, R. 256–263). Included among the applications denied by this order was that of respondent (R. 263). The order and the certificate granted to Chicago and Southern Air Lines, Inc., were approved by the President on May 22, 1946 (R. 269–271).

A motion which had been filed by Waterman on May 6, 1946 requesting reopening and reargument of the proceeding was denied by Order Serial Number 4795 dated May 17, 1946 (R. 114). After the final decision approved by the President had been published, Waterman filed a petition for rehearing and reconsideration on June 24, 1946 (R. 290–303). This petition was denied by Order Serial Number 4977 dated July 12, 1946 (R. 328–330). Thereafter Waterman filed a petition in the court below seeking review of the Board's actions (R. 1–9).

In the petition below, the court was requested to review (1) the Board's final disposition of the proceeding as approved by the President, (2) denial of the interlocutory motion to reopen the proceeding, (3) denial of the petition for rehearing and reconsideration, and (4) a certain dictum of the Board contained in its opinion concerning

the status under the Act of surface carrier applicants for certificates of public convenience and necessity.

The Board filed a motion to dismiss the petition for review for lack of jurisdiction, or, in the alternative, to affirm the Board's orders (R. 27). Chicago and Southern intervened and filed a similar motion (R. 360, 388). By leave of court, the motions were heard on an abbreviated record containing the applications, orders, and related documents pertinent to the jurisdictional issues raised (see R. 408).

The court below denied the motions to dismiss, holding that it had jurisdiction to review under Section 1006 (a) of the Act notwithstanding the fact that the Board's actions in granting and denying certificates were subject to and had received approval by the President (R. 407–412).

On May 13, 1947 the Board filed in this Court a petition for a writ of certiorari. The intervenor, Chicago and Southern, had filed such a petition on May 6, 1947. Both petitions were granted on June 16, 1947.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that orders issued by the Civil Aeronautics Board after approval by the President of the United States pursuant to Section 801 of the Act are subject to judicial review under Section 1006 (a) of the Act.

(2) In holding that it has jurisdiction to review an order upon which it cannot render a judgment with finality and conclusiveness.

(3) In failing to grant the motion to dismiss filed by the Civil Aeronautics Board.

SUMMARY OF ARGUMENT

I

Section 801 of the Civil Aeronautics Act provides that orders of the Civil Aeronautics Board with respect to foreign air transportation are subject to the approval of the President. The reason for this is the relationship between such transportation and considerations of international relations and the national defense. In recognition of the President's constitutional control over these executive functions, the statute gives the President a supervisory power which he may exercise on the basis of information and advice received from the diplomatic and military branches of the Government without being limited to the facts in the record before the Board.

Section 1006 (a) provides for judicial review of "any order" of the Board "except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801". The limited nature of the excepting clause by itself would suggest that orders in respect of American air carriers engaged in foreign air transportation were to be reviewed. But re-

spondent and the court below have conceded that the President's decision is not reviewable, and that the President may approve or disapprove any order of the Board even after it has been conformed to the judgment of a reviewing court.

To construe the Act in accord with the decision below as requiring judicial review of the Board's decision but as empowering the President to disregard the judgment of the court would conflict with well established doctrine as to the nature of the judicial power under the Constitution. For ever since *Hayburn's Case* in 1792 this Court has held without deviation that the courts created under Article III of the Constitution may only act judicially, that judicial action contemplates the making of judgments which will be binding on the parties, and that a judgment is not judicial if it is subject to review by an administrative official. In addition, orders relating to foreign air transportation raise issues of foreign relations and military policy such as the courts have treated as political matters which are not adaptable to judicial control. Section 1006 (a) should be given a constitutional construction which will avoid these difficulties.

The statute is susceptible of such a construction despite the limited excepting clause. The phrase "any order" in other statutes providing for judicial review has been construed as not authorizing review of orders which are not final

in nature. Furthermore, to permit orders which the President must approve to be reviewed would be inconsistent with the scheme specifically provided for in Section 801 whereby the orders of the Board are submitted to and approved by the President before publication. The only order which the Board ever publicly promulgates is that which embodies the views of the President. As a result, a court cannot review the Board's decision prior to presidential approval. To permit judicial review after the President has approved would in fact constitute a review of the exercise of the President's executive power. The difficulties in the way of review where the President does not act on the basis of the Board's record, and need give no reason for his decisions, are obvious.

The provisions in Section 1006 (d) and (f) giving the circuit courts of appeals "exclusive jurisdiction" to modify and set aside the Board's orders with review "only" in the Supreme Court are also not compatible with ultimate review by the President. And the standard provision for finality of the Board's fact findings if supported by substantial evidence would hardly be appropriate when the actual order entered may be based upon the President's consideration of matters outside the Board's record.

We submit that the internal statutory contradictions which will arise if Section 1006 (a) be

interpreted as permitting judicial review of Board orders which are subject to the President's approval under Section 801, as well as the necessity of giving the Act a constitutional construction, demonstrate the correctness of the decision of the Second Circuit in *Pan American Airways, Inc.* v. *Civil Aeronautics Board,* 121 F. 2d 810, holding that such orders may not be reviewed.

II

If Section 1006 (a) of the Civil Aeronautics Act is construed as providing judicial review for orders of the Civil Aeronautics Board which are subject to the approval of the President, such review is inherently limited to the determination of whether such orders are beyond the authority conferred by the Act and were issued after compliance with the statutory procedures. The courts may not review the exercise of the President's discretion in the field of foreign and military policy. And since the President in exercising his discretion is not required to limit himself to the evidence before the Board, there can be no record upon which a reviewing court may determine whether his decision is supported by evidence. Such a pattern of limited review is identical with that involved by the courts in dealing with a similar situation under the tariff laws.

The questions raised by respondent's petition for review relate almost entirely to the correct-

ness of the Board's findings and the adequacy of the evidence to support them, which questions under the above test are not susceptible of review after the order has been approved by the President. The other alleged errors, asserting the absence of a finding and the Board's reliance on an erroneous principle of law, are shown to be baseless on the face of the Board's opinion, which contains the finding asserted to be lacking and which explicitly states that the Board did not invoke the principle of law to which respondent refers. Thus, even if it be assumed that the Board's order, as approved by the President, may be reviewed to a limited extent, respondent's petition for review should still be dismissed.

ARGUMENT

INTRODUCTION

The issue in this case is whether orders of the Civil Aeronautics Board which are subject to approval by the President may be reviewed by the circuit courts of appeals under Section 1006 (a) of the Civil Aeronautics Act. The jurisdiction of the circuit courts of appeals is derived only from that section. No question is presented as to whether Board orders approved by the President are in no circumstances to be reviewed by any court. Cf. *American Federation of Labor* v. *Labor Board*, 308 U. S. 401, 404. Any review, however, would necessarily be limited to whether the order was within the authority conferred by

the statute and in accordance with statutory procedures; the courts cannot review the exercise of the President's discretion in the field of foreign and military policy, in which the President need not act on the basis of the evidence in the public record. If this Court should be of the view that judicial review of presidentially approved orders is available under Section 1006 (a), such review is inherently so limited, for reasons set forth at greater length in Point II hereof.

I

ORDERS OF THE CIVIL AERONAUTICS BOARD WHICH ARE SUBJECT TO PRESIDENTIAL APPROVAL MAY NOT BE JUDICIALLY REVIEWED

The Civil Aeronautics Act provides that the Civil Aeronautics Board shall issue certificates of public convenience and necessity for all air transportation (interstate and foreign) by American air carriers (Section 401, Section 1 (2)), and permits to foreign air carriers to engage in foreign air transportation (Section 402).[5] But as to foreign and overseas[6] air transportation (whether by

[5] Foreign air transportation is defined to mean transportation between the United States and places outside thereof. (Section 1 (21) (c).)

[6] Overseas transportation is defined as transportation between the United States and its territories or possessions or between such territories and possessions. Inasmuch as transportation between the United States and Puerto Rico involves routes touching Cuba, San Domingo, Haiti, and Jamaica there is in substance no difference between foreign and overseas transportation in so far as this case is con-

American or foreign carriers), Section 801 makes the issuance and denial, *inter alia*, of all certificates and permits "subject to the approval of the President".

Section 1006 (a) provides that:

> Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia * * *

The exception in this provision for orders "in respect of any foreign air carrier subject to the approval of the President" under Section 801, and the absence of a similar exception for orders relating to foreign air transportation by American carriers, is an indication, of course, that Congress intended Board orders respecting American air carriers in foreign air transportation to be reviewed.

The statute, however, does not provide for any review of *the President's* determination, and, indeed, it is admitted in this case that the President's decisions are not reviewable.

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cerned. "Overseas" transportation was subjected to the President's authority because of its strategic military importance (see p. 23, *infra*) and because of its integration with foreign air transportation. The relationship between transportation to this country's territories and possessions in the Caribbean and the Pacific and the national defense needs no elaboration.

Both the court below[1] and respondent in its brief[2] disclaimed any contention that the court had authority to pass upon any exercise of the President's authority.

The result under the decision below is that the orders of the Board are reviewable, but that such orders are to be submitted to the President after they have been judicially approved, and the President is then free to disregard the court's action if he sees fit. It is our position that other provisions of the Act would be unworkable if Section 1006 were so construed, and that to construe the statute as authorizing the courts to review orders of the Board which, even after judicial review, are concededly subject to the approval of the President would bring the statute into conflict with the limitation imposed upon the courts by Article III of the Constitution. The difficulties created by so reading Section 1006 (a) can be avoided if, as in other statutes providing for judicial review, the phrase "any order" is interpreted as excluding the essentially interlocutory pronouncements

[1] The opinion below states: "The court has no power to question or review either the approval or disapproval of the President. He does not have even to state his reasons. * * * the Board's action is subject to court review to the extent the Act provides and permits. It is not final until the Board and the court have completed their functions. Thereafter the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." (R. 411.)

[2] "It must be kept in mind that we are *not* requesting this Court to review the action of the President." (Respondent's brief below, p. 26.)

of the Civil Aeronautics Board which are subject to Presidential approval. The Act was so construed, and we submit, correctly, by the Second Circuit in *Pan American Airways* v. *Civil Aeronautics Board*, 121 F. 2d 810,[9] for reasons which we shall now elaborate.

A. THE CLOSE RELATIONSHIP OF FOREIGN AIR TRANSPORTATION TO FOREIGN AND MILITARY POLICY

An understanding of the intimate relationship of overseas and foreign air transportation to international relations and national defense contributes materially to an understanding of the purposes underlying Section 801, of the necessity for subjecting the action of the Board in this field to the authority of the President, and of the unsuitability of the subject for judicial review.

It is universally accepted that each nation has complete and exclusive sovereignty of the air space superadjacent to its territorial lands and waters, and that navigation of foreign aircraft through such air space is permitted only upon consent of the nation concerned.[10] Thus no nation

[9] See also *Pacific Overseas Airlines Corp.* v. *Civil Aeronautics Board*, 161 F. 2d 633 (App. D. C.) which assumed the correctness of the Second Circuit's interpretation.

[10] International Convention for the Regulation of Aerial Navigation, signed at Paris on October 13, 1919 by representatives of twenty-six countries (not ratified by the United States); Convention of Commercial Aviation, signed at Havana, February 20, 1928 (to which the United States is a party); Sec. 6 (a), Air Commerce Act of 1926, 44 Stat. 568, 49 U. S. C. 176; Part I, Convention on International Civil Aviation, Articles 1 and 6 (Executive A; 79th Cong., 1st Sess.).

can grant its citizens rights to fly to or over other countries without obtaining their consent, and this means that such rights can be secured only through negotiation and agreements between nations. To inaugurate a foreign air transportation service between the nations of the world today thus requires the invocation of the intricate machinery of diplomatic negotiation for access to, and landing rights in, foreign countries and for other aeronautical privileges and facilities. Such negotiations necessarily involve considerations of economic policy and of national defense.

In order to avoid international friction and to promote international cooperation, the nations of the world have created a permanent International Civil Aviation Organization,[11] which now has become affiliated with the United Nations.[12] The member States of ICAO have explored the possibility of effecting a multilateral agreement on commercial rights in international air transport, but discussions to date on this subject have disclosed that important countries are not sufficiently in accord.[13] Accordingly such commercial rights

[11] Established pursuant to the Convention on International Civil Aviation, ratified by the Senate on July 25, 1946 (Executive A; 79th Cong., 1st Sess.). The permanent organization, ICAO, came into existence on April 4, 1947 upon ratification by the requisite twenty-six nations. A total of 47 nations participated in the first Assembly in Montreal, May 6–27, 1947.

[12] Vol. XVI, The Department of State Bulletin, No. 415, p. 1147, June 15, 1947.

[13] *Id.*, at 1149.

continue to be the subject of bilateral conventions and agreements between sovereignties. In order to provide for necessary rights involved in commercial operations, the United States has concluded thirty-four bilateral air transport agreements.[14] Moreover, the President, through the State Department and by personal emissaries, continues to conduct negotiations for additional air transport agreements with other nations.

In negotiating international agreements as to foreign air transportation the President is necessarily guided not only by the considerations which affect international trade and commerce but also by political and military factors as well. The very existence of commercial air routes with their physical facilities, and the valuable experience in flying them, are of great value to military forces, as experience in the war amply demonstrated.[15]

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[14] Reference: official information compiled by Aviation Division, Department of State.

[15] "Military considerations also play a part in the restriction of the freedom of international air commerce. Army and navy authorities are always afraid that their fortifications, bases and other military preparations will be observed from the air, or that foreigners will make surreptitious aerial surveys of the country. * * *

* * * * * * *

"The development of commercial air transport has, of course, a very close connection with a nation's military air power. The most important military advantage derived from air transport probably lies in the development of airways, of air navigation aids and of ground organization—all of which enormously facilitate the rapid movement of military aircraft. Furthermore, the existence of airlines makes it pos-

As was stated by Mr. Clinton M. Hester, who explained the bill which ultimately became the Civil Aeronautics Act, to the Congressional committees on behalf of the Interdepartmental Committee which had drafted the bill: [16]

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sible in emergencies to transport essential war materials and personnel rapidly. * * *" Oliver J. Lissitzyn, Rockefeller Research Fellow on the Staff of the Council on Foreign Relations, *The Diplomacy of Air Transport*, 19 Foreign Affairs, October 1940, pp. 156, 166, 169.

A significant application of this standard appears in *American Overseas Airlines, Inc., et al., South Atlantic Route*, 7 C. A. B. 285, 305 (1946), in which a route was awarded to Pan American Airways, Inc. from Natal, Brazil to a point on the coast of West Africa, via Ascension Island, primarily for the purpose of maintaining a base at Ascension Island for the future needs of national defense. In commenting upon the estimated cost of $1,500,000 to operate such route, the Board said, "Ordinarily such a cost could deter us in certifying this route. But considerations of national defense for the certification of this route have been advanced by high levels of the War and Navy Departments and of the Executive. Their interpretation of 'national defense'—an objective that under the Act we must heed—weighs heavily as against economy of operation."

[16] Hearings before the House Committee on Interstate and Foreign Commerce, 75th Cong., 3d Sess. (1938), on H. R. 9738, pp. 147–148.

The Interdepartmental Committee mentioned consisted of Assistant Secretaries of six Executive Departments—State, War, Navy, Post Office, Commerce, and Treasury—assigned to study civil aviation bills and report recommendations to Congress. This Committee held hearings for two months during which representatives of every phase of the aviation industry appeared and testified concerning the type of aviation legislation that should be recommended. Conferences were also held with members of Congress. The drafting of the bill was done under the supervision of the Assistant Legislative Counsel of the Senate. *Id.*, at p. 36,

> * * * Now, where the President has control he can refer the matter to the State, War, and Navy Departments before he reaches a decision. You can see the necessity of the President, from an international defense standpoint, having an opportunity to review the question as to whether or not a certificate of convenience and necessity shall be issued to an American-flag air line flying through our Territories for the reason that they carry foreign passengers. We do not want foreign passengers flying over our fortifications in our Territories so that they can observe them.
>
> In flying to foreign countries, from a national defense and international relations standpoint, it is very important that the President, the War Department, and the Navy Department, as well as the State Department have something to say about where our air bases will be established in foreign countries.

Such factors have to be taken into account both in negotiation with foreign nations and in the awarding of air routes. Indeed, as a result of the established importance of international air transportation in a nation's foreign affairs and in national defense, most of the important nations of the world have a direct share in the ownership or management of international commercial air transport enterprise.[17] The practice of these

[17] Oliver J. Lissitzyn, *International Air Transport and National Policy* (1942), Council on Foreign Relations, p. 109.

nations demonstrates that international air transportation is in reality, directly or indirectly, an arm of the government whose nationality the carrier possesses.

It is thus clear that the establishment of international air transport services is rarely controlled by purely commercial considerations. Such services have become instruments of national policy, promoting international relationships, exalting national prestige, disseminating political and economic information, and furthering the national defense.[18] In determining such matters it is not inconceivable that the successful negotiation and continuation of bilateral agreements may substantially be influenced by such a consideration as whether or not a particular carrier which may be authorized to conduct the service is acceptable to the foreign country concerned.

Congressional recognition that the control of foreign air transportation is a part of the field of foreign affairs appears in Sections 802 and 1102 of the Civil Aeronautics Act. Section 802 requires the State Department to advise and consult the Board concerning negotiations of aviation agreements with foreign governments. Section

[18] See Dr. Goedhuis, lecturer in Air Law at Leiden University, *Civil Aviation After the War* (1942), 36 Am. J. Int. L. 596; Dinu, *Background of International Law, Monographs on the Background of Aeronautical Law* (1944), 23 Mich. S. B. J. 187, 194; Oliver J. Lissitzyn, *International Air Transport and National Policy* (1942), Council on Foreign Relations.

1102 provides that the Board shall perform its duties "consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries * * *".

That diplomatic negotiations are essential in dealing with air transportation between the United States and foreign countries is illustrated by the situation involved in the present case. In connection with the services authorized in this case, the State Department was required to enter into negotiations with the various Latin American countries for *ad interim* aeronautical rights on behalf of the carriers awarded certificates, pending negotiation and completion of bilateral air transport agreements. With reference to the certificate granted by the order of which review is sought herein, negotiations were necessary with the governments of Cuba, Haiti, and the Dominican Republic in order to secure landing rights and other aeronautical privileges to be made available to Chicago and Southern Air Lines. Further, that portion of the route awarded to Chicago and Southern between Houston-New Orleans and Havana is a segment of the route from the United States to South American points via Jamaica for which Chicago and Southern has been designated as the air carrier to operate pursuant to the Bilateral Air

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Transport Agreement with the United Kingdom.[19]

B. THE CIVIL AERONAUTICS ACT GIVES THE PRESIDENT SUPERVISORY POWER OVER FOREIGN AIR TRANSPORTATION

Our constitutional system entrusts the handling of all such diplomatic and defense matters to the President and those who act on his behalf. In the Civil Aeronautics Act Congress has affirmed his ultimate authority in Section 801, which subjects the Board's determinations in this field to his supervision.[20] In explaining the necessity for such a provision, Mr. Hester testified (House Hearings, pp. 37–40):

P. 37:

> The bill would require the new agency to exercise its executive functions, including

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[19] Route No. 11, Part B, of Annex No. 3, to the Bermuda Agreement provides for a route to be served by a United States air carrier between New Orleans and Houston, points in Cuba, Jamaica, Aruba and South American points. The British Government has been notified that Chicago and Southern has been designated as the United States carrier for this route pursuant to the Board's decision approved by the President in the Latin American Case.

[20] Since the statute itself gives the President final authority, there is no issue here as to the extent to which the President's power over this subject exists apart from statutory authorization. It is to be noted, however, that in *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–320, the Court indicated that in matters of international relations the President possessed "a power which does not require as a basis for its exercise an act of Congress". See generally Corwin, *The President* (1940); Corwin, *President's Control of Foreign Relations* (1917); McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements*, 54 Yale L. J. 181 (1945).

those relating to national defense and international affairs, under the general direction of the President. All executive functions under the Constitution are vested in the executive branch of the Government and since much of the work of this new agency would be executive in character, the bill gives to the President his constitutional control over these executive functions.

P. 40:

The present bill * * * provides that the issuance of certificates authorizing the operation of an air line in overseas and foreign commerce shall be subject to the approval of the President. It was recognized that the operation of an air line between our Territories and possessions, and between the continental United States and our Territories, and possessions, involve the consideration of national-defense problems. It was further recognized that the operation of an air line between this country and a foreign country involves questions of international relations and national defense. Consequently, it was considered advisable to make the issuance of certificates authorizing such operations subject to the approval of the President, who is both the Commander in Chief of the Army and Navy and the custodian of the interests of the United States in foreign affairs.

See also pp. 38–39.

In the hearings on S. 3760 before the Senate Committee, Mr. Hester stated (p. 6):[21]

> The authority of the President under this legislation would be the power under section 801 to approve certificates authorizing the operation of American flag air lines in foreign air commerce.
>
> The CHAIRMAN. That is a natural function of the President in foreign affairs.

When the substitute bill, S. 3845, was reported out by the Committee, Senator Truman, acting at the request of Senator McCarran, moved consideration of the bill. In explanation of Section 801, Senator Truman stated (83 Cong. Rec. 6726):

> Certificates involving national defense: Section 801 of the substitute, unlike S. 3659, gives the President the power to approve or disapprove the issuance, denial, terms, and so forth, of certificates and permits for overseas and foreign operations. *This check is required by the very delicate questions of national defense which are involved.* * * *. [Italics supplied.]

Although the various bills underwent many changes, the provisions of the present Section 801 came through the legislative process without substantial modification.

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[21] Hearings before the Senate Committee on Commerce, 75th Congress, 3rd Session, 1938, on S. 3760. The pertinent provisions in this bill were similar to those in S. 3845.

The procedure by which the President's approval is obtained is important to an understanding of this case. The Board, of course, first holds its hearings. In the normal course, as in this case, a trial examiner hears the evidence and makes a report, the parties have an opportunity to except thereto, and argument is heard by the Board. The Board thereafter prepares its decision, and, pursuant to the express requirement of Section 801, submits the decision and proposed orders and certificates (but not a transcript of the evidence at the hearing) to the President before publication thereof. The President then has an opportunity to consult with such other agencies of the Government and to obtain such additional information as he deems advisable, and in due course he returns the decision and order to the Board marked "Approved", or advises the Board as to respects in which he disagrees with the Board's proposals. In the latter situation, the Board without re-opening the proceeding then modifies its order so as to conform to the President's advice, and revises its opinion so as to state that this has been done. The revised order and opinion are re-submitted to the President, who then approves them. Not until that time is the decision made public.

The court below held that Section 801 only gave the President a veto power—the power to frustrate the Board's orders, not to make them, and this seems to have been a basis for its decision

(R. 411–412). But the history of the Section (see pp. 22–24, *supra*) as well as its language, shows that the section was designed to recognize and sanction the exercise by the President of "his constitutional control over these executive functions", and "to give the President his constitutional authority over the executive functions and those affecting international relations and national defense".[22] The exercise by the President of his "constitutional authority" would vest in him supervisory control over the Boards decision and not a mere power of veto.

That the President's power is to be directive and not merely negative is also indicated by the fact that Section 801 subjects to his approval the "denial" as well as the issuance of certificates. Disapproval by the President of the Board's proposed denial of a certificate is, of course, the equivalent of a directive that the certificate issue. The Board must render some decision on the application,[23] and if the President's approval is to be obtained its only choice in such a case is to grant the certificate.[24]

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[22] The quotations are from the testimony of Mr. Hester before the House Committee. House Hearings, pp. 37–38.

[23] Section 401 (c) provides that "such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible."

[24] The Board has declared in its Statement before the President's Air Policy Commission (October 27, 1947, p. 146):

* * * So long as he has power to disapprove the

Any doubts as to the breadth of the power given the President by Section 801 must be resolved by the consistent administrative practice under the section and the interpretation of it by both the President and the Board for the nine years in which it has been in effect. (See also Op. A. G., June 18, 1946, Vol. 40, Op. No. 110.) Every order involving a certificate or permit for foreign air transportation is submitted to the President before publication, and no decision or order is announced until after a decision satisfactory to the President has been approved by him. In every case in which he has disagreed with the Board's original decision, he has not merely returned the order without approval, but has advised the Board as to the changes he wished to be made; the Board has then obeyed his instructions by redrafting its order.[25] In doing so, the Board has not re-opened its hearing or stultified itself by making different findings on the same public record. It has merely stated the fact of the President's advice and issued a new order which the President has then approved.

Board's action, the President can continue to disapprove successive solutions suggested by the Board until the Board finally comes forth with the solution which he is willing to approve. Rather than go through this ritualistic and time-consuming process, it is preferable to have the President indicate, at the first opportunity following his consideration of the Board's recommendations, the route and carrier which he will approve. . . .

[25] See Statement of Civil Aeronautics Board before the President's Air Policy Commission, October 27, 1947, pp. 142–143.

C. TO CONSTRUE THE ACT AS AUTHORIZING JUDICIAL REVIEW OF ORDERS WHICH THE PRESIDENT MAY DISREGARD AFTER THE COURT HAS ACTED, WOULD IMPOSE UPON THE COURTS NON-JUDICIAL FUNCTIONS CONTRARY TO ARTICLE III OF THE CONSTITUTION

The above description of the manner in which the Board and the President act upon applications for certificates for foreign air transportation suggests a fundamental error in the decision below. For to permit judicial review of Board orders which become operative only if subsequently approved by the President would be in conflict with the well-established doctrine as to the nature of the judicial power.

The court below conceded that Congress has given the President "what amounts to an absolute veto as to all orders of the Board respecting all the matters named in Sec. 801", and that this veto power "would persist as to any modification of such an order by the court under Section 1006 (c) (*sic*) or any new order framed by the Board under direction of the court." (R. 411). The court further stated that it had "no power to question or review either the approval or disapproval of the President" (R. 411). This means that if the court should undertake to review the orders of the Board in question, it could not render a judgment having finality and that any judgment which it might render would necessarily be advisory and subject to revision by the President.[26]

[26] This is true whether the court is reviewing an order of the Board which has not yet been submitted to the President for approval or an order which has already been ap-

Ever since *Hayburn's Case,* 2 Dall. 409, which reflected the views of five justices of this Court sitting on circuit, this Court has held without variation that the courts created by Article III of the Constitution may only act judicially, that judicial action contemplates the making of judgments which will be binding on the parties, and that a judgment is not judicial if it is subject to review by an administrative official. *Hayburn's Case* itself involved a statute empowering the federal judges to make decisions as to Revolutionary War pensions, but these decisions would then be subject "to the consideration and suspension of the secretary at war, and then to the revision of the legislature." In *United States* v. *Ferreira,* 13 How. 40, the statute authorized the judges of the Florida district court to pass upon certain claims; if the judges "shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof." The Court, speaking through Mr. Chief Justice Taney, reaffirmed the doctrine of *Hayburn's Case,* stating that the power sought to be imposed upon the

proved by the President, for in either situation the President still possesses the power to disapprove the decisions rendered by the Board in conformance with the judgment of the court.

court "subject to the revision of a Secretary and of Congress, could not be executed by the court as a judicial power." (13 How. 49–50).

Again in *Gordon v. United States*, 117 U. S. 697, decisions of the Court of Claims were not to become effective until after an appropriation therefor "shall be estimated for by the Secretary of the Treasury"; it depended upon the Secretary "to decide whether he will include it in his estimates of private claims, and if he should decide in favor of the claimant" (p. 699). This was held to render the action of the Court of Claims nonjudicial, and to bar appeal to the Supreme Court in Court of Claims cases. The opinion states that Congress cannot "authorize or require this Court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties" (p. 702), and that "when the decision of the court was subject to the revision of a Secretary and Congress, it was not the exercise of a judicial power, and could not therefore be executed by the court" (p. 703). Chief Justice Taney concluded that "no principle of constitutional law has been more firmly established or more constantly adhered to" (p. 704). These decisions have been repeatedly cited with approval in subsequent

cases.[27] See particularly *In re Sanborn*, 148 U. S. 222, 226; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 483–484; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, 456–457; *Muskrat* v. *United States*, 219 U. S. 346, 362; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 400–401. In the *Sanborn* case, the Court declared, in the course of holding that it had no jurisdiction to review a special finding of the Court of Claims,

> Such a finding is not made obligatory on the department to which it is reported—certainly not so in terms—and not so, as we think, by any necessary implication. We regard the function of the Court of Claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by the department or by congress.

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[27] See also Frankfurter and Landis, *Power of Congress Over Procedure In Criminal Contempts In "Inferior" Federal Courts—A Study in Separation of Powers*, 37 Harv. L. Rev. 1010, 1020, in which the constitutional limitations upon the authority of Congress over the courts are defined in part as follows:

> These limiting conceptions may be thus defined: (1) It is the characteristic of courts to decide and not merely to advise. Their work must be definitive and not consultative. They are an independent organ of government with finality of judgment within their domain, and not advisory adjuncts of the executive or the legislature.

> It is, therefore, within the scope of the decision in *Gordon* v. *United States*. * * *

And in *United States* v. *Jefferson Electric Co.*, 291 U. S. at 400–401, the Court stated, with respect to a statute which might be construed as authorizing a judgment which would be paid only if the claimant proved to the Commissioner that he was entitled to it:

> Decisions of this Court have long since established that it is not within the province of courts created by or under the judiciary article of the Constitution to give or review judgments of that character, for they are not final or binding adjudications.

This constitutional principle would clearly be applicable here if Section 1006(a) is construed to permit judicial review of Board orders which are subject to the approval of the President. For the court's order, whether it affirmed or set aside the Board's decision, whether it granted or denied rights to Waterman or Chicago and Southern, would not determine the rights of the parties unless the President subsequently agreed. If he did not agree, the President could completely disregard what the court had adjudged. This would be so even if the circuit court of appeals was able to review the decision of the Board before the matter ever came to the President's attention. When in fact the President makes his determination prior to the submission to the court, the

absence of any decisive character in judgments which the President may disregard if he sees fit is even more apparent.

Another line of authorities leading to the same conclusion is that which refuses to permit review of administrative determinations which occur in the middle of a proceeding and have no legal effect in and of themselves. Orders setting a case for hearing[28] and orders fixing valuation preliminary to a rate proceeding[29] are not reviewable, since they do not determine any right or obligation. Although these cases rest primarily on the principle that administrative remedies must be exhausted before the courts will act, this Court has observed (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131) that:

> Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article III of the Constitution by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. III, § 2, U. S. Constitution. Partly they are an aspect of the procedural phi-

[28] *United States* v. *Illinois Central R. Co.*, 244 U. S. 82; cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375.

[29] *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299.

losophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding.

Both administrative and constitutional reasons would thus combine to preclude review of a trial examiner's report which had no effect until a superior authority had approved it. The situation here is not basically different.

Another principle which this Court has frequently invoked in order that our constitutional structure shall provide a workable governmental machinery is that of precluding judicial review of political questions.[30] "In determining whether a question falls within that category [political and not justiciable], the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations. There are many illustrations in the field of our conduct of foreign relations, where there are considerations of policy, considerations of extreme magnitude, and certainly, entirely incompetent to the examination and decision of a court of justice.'" *Coleman* v. *Miller*, 307 U. S. 433, 454–

[30] See Frankfurter and Landis, *op. cit.*, *supra*, p. 31, 37 Harv. L. Rev. 1021–1022, which includes "the conduct of foreign affairs" as among the subjects as to which "the courts are not the organ of government adapted for their solution."

455. Earlier, in *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302, the Court also said:

> The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—"the political"—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision. * * *

We have shown that the awarding of foreign air transportation routes is, in large part, a matter of diplomatic as well as military concern. The ultimate decision must depend upon international negotiations. Awards may be granted upon the basis, *inter alia*, of what the President and the State Department believe will most facilitate accords with other countries. The factual foundation of the President's action will frequently not be public or susceptible to judicial review. This Court's statements in *Curtiss-Wright Corp.* v. *United States*, 299 U. S. 304, 319–321, with respect to the comparative positions of Congress and the President in dealing with foreign affairs, have even greater strength as between the President and the Judiciary. The President, "not Congress", the Court declared,

> has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other

> officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. * * * [pp. 319–320.]
>
> * * * * * *
>
> When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. [p. 321.]

The reasoning of these authorities we think requires the conclusion that such matters as the awarding of foreign air routes present political questions and are not appropriate for judicial review.[21]

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[21] Respondent and the court below seek to avoid the effect of this principle by arguing that the court reviews the order of the Board, not that of the President, which is conceded not to be subject to judicial scrutiny. But in substance the Board's order is merely a recommendation to the President. The situation is similar to that presented in *United States* v. *Bush & Co.*, 310 U. S. 371, which involved the provisions of the Tariff Act whereby the Tariff Commission would report its recommendations to the President and he would then issue a proclamation if he agreed. In refusing to permit judicial review, this Court stated (p. 379):

> It is the judgment of the President on those facts which is determinative of whether or not the recom-

It is, of course, axiomatic that statutes will be given a constitutional construction. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 307; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 390. The strength of this rule necessarily increases with the certainty that a different construction would be invalid. In this case, if the Court were of the view that Congress really intended that Board action subject to the President's authority was to be judicially reviewed, it would be faced with the necessity of declaring the provision for such review *pro tanto* in violation of Article III of the Constitution. Since the invalidity of such an application of Section 1006 (a) obviously would not nullify the remainder of the Act (even apart from the severability clause, Section 1109), the effect of declaring Section 1006 (a) partially unconstitutional and of construing it so as to avoid that result would be precisely the same. For the reasons to be stated, we do not think that Section 1006 (a) need be construed in the manner urged by the respondent. It would therefore be appropriate

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mended rates will be promulgated. In substance and to a great extent in form * * * the action of the Commission and the President is but one stage of the legislative process.

The *Bush* case indicates, we think, that the substantive nature of the functions of the Board and of the President controls, not whether the Board's submission to the President is called a report or an order.

for the Court to avoid the constitutional difficulty by interpreting the section as not requiring the courts to review Board orders which the President may disregard.

D. THE CIVIL AERONAUTICS ACT MAY BE CONSTITUTIONALLY CONSTRUED AS NOT REQUIRING JUDICIAL REVIEW OF BOARD ORDERS WHICH ARE SUBJECT TO PRESIDENTIAL APPROVAL

To construe Section 1006 (a) as not extending to orders which are subject to Presidential approval will not require the use of any but familiar principles of statutory construction.

The controlling phrase in the subsection is "any order" issued by the Board. These words are not novel. The Urgent Deficiencies Act (28 U. S. C. 46) refers to suits to enjoin "any order of the Interstate Commerce Commission." The provisions for review in the Federal Power Act refer to "an order" of the Federal Power Commission. And yet this Court has not hesitated to hold that such language should not "be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character." *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 383. The Court's opinion in the *Metropolitan Edison* case reviews the decisions which have held that despite the phrase "any order" in the Urgent Deficiencies Act, "there are many orders of the Commission which are not judicially reviewable under this provision." *Rochester Telephone*

Corp. v. United States, 307 U. S. 125, which overturned the negative order doctrine, did not cast doubt on this general principle, but on the contrary reaffirmed it. See 307 U. S. at pp. 130–131.

The same principle of construction should be given effect here with respect to almost the identical statutory phrase used in a similar setting. The orders of the Civil Aeronautics Board, which are subject to the President's approval, have no more legal effect by themselves in the absence of such approval than the valuation orders held to be nonreviewable in *United States* v. *Los Angeles and Salt Lake R. Co.*, 273 U. S. 299, 309. When orders of the Civil Aeronautics Board are subject to the approval of a higher authority, who acts in a sphere which is not susceptible of judicial control, there are more reasons than in the statutes we have cited for not giving "any order" a literally all-inclusive construction.

As against this, there is the argument of *expressio unius est exclusio alterius*—that the specificity of the exception for foreign air carriers means that other exceptions were not intended. The fact that § 1006 (a) was revised in committee[22] so as to narrow the exception from

[22] Cf. S. 3845, 75th Cong., 3d sess., as introduced on April 14, 1938, and the Senate committee print of April 19, 1938, which contains the bill as reported. The amendment proposed by the committee was agreed to on the floor of the Senate. 83 Cong. Rec. 6764. There was no discussion as to the reason for this change and no explanation of it was ever made. In the House, the bills at one time exempted

"order in respect of foreign air transportation" to "order in respect of any foreign air carrier" would in and of itself carry great weight in this direction. But whatever force this fact might otherwise have is outweighed, we submit, by the internal inconsistencies which will result, if no exception for any other type of order is allowed, by the nature of the statutory scheme with respect to orders affecting foreign affairs and the reluctance of the courts to participate in the determination of such matters, and by the serious constitutional barrier to making the judicial action subordinate to the authority of the Chief Executive.

Inconsistency with Section 801. Although the limited exception in 1006 (a) may be said to manifest an intention that orders of the Board with respect to foreign air transportation by American carriers be subject to review by the courts, Section 801 manifests an intention that such orders be subject to the control of the President.

It is not contended by respondent that Section 1006 (a) permits judicial review of orders of the

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from review all orders approved by the President. H. R. 7273, print of January 22, 1938, § 905; H. R. 9738, March 4, 1938, § 1005 (a). H. R. 9738 was subsequently amended in Committee to except from review only orders with respect to foreign air carriers. See prints of April 6, 1938, and April 28, 1938, which is the form in which the bill was reported. The conference committee accepted the Senate version of Section 1006 (a), which differed in language but not in substance from the House draft.

President, and the court below held that this was not the case. See pp. 13–14, *supra*. The language of the section provides only for review of orders of the Board. The matters which the President must take into account are unsuitable for judicial action. He must negotiate with foreign powers, and base his decision on his knowledge of foreign affairs and military necessity, matters which are peculiarly within the province of the two political departments of the Government rather than the judicial, as this Court has often recognized.[33] He can act, and is intended to act, upon the basis of official and confidential information available only to him as the Chief Executive concerned with our international relations and as Commander-in-Chief of our armed forces. The extent to which he relies on facts presented to the Board, as contrasted with facts not contained in the Board's record, cannot be ascertained in any particular case. The confidential nature of his information, which may relate to matters of military as well as of diplomatic importance, in itself precludes any such disclosure. The nature of the subject thus precludes the President from making findings disclosing the reasons for his decision, and as the court below conceded (R. 411), he is required to

[33] *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302, and cases cited; *Coleman* v. *Miller*, 307 U. S. 433, 454–455, and authorities cited. Cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 320.

give no reasons. Determinations based on such material are hardly susceptible of judicial review.[34]

We may thus start with the concession of respondents and the court below that the President's decision was not intended to be reviewed. Respondent contends, however, that the Board's order may be reviewed.

This argument assumes that the Board's order and the President's are readily separable. The method of review, as outlined by the court below,

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[34] "The Board in its consideration of new route cases is necessarily confined to the record made before it by the parties to the proceeding and must be governed by the principles set forth in Section 2 of the Act defining public convenience and necessity. After thorough consideration of the record, the Board, which is the administrative agency charged with the primary responsibility for the development of a sound air transportation system, makes its recommendations in considerable detail to the President for his consideration. However, the President has an additional responsibility in all matters pertaining to the proper conduct of our international relations. Under the Constitution it is the President's responsibility and duty to conduct the foreign affairs of the United States. The President has access to many sources of information and to data which are not included in the record before the Board. Indeed, much of this data may consist of secret and confidential material which it would be improper to include in an open record. The President must also take into consideration many factors relating to the conduct of international affairs of which the Board is unaware." Statement of Civil Aeronautics Board before the President's Air Policy Commission, dated October 27, 1947, p. 144.

seemingly was for the court to review the Board's findings, for the Board to conform to the court's decision, and then for the Board's order as judicially approved to be submitted to the President. The court said in this connection (R. 411):

> * * * the Board's action is subject to court review to the extent the Act provides and permits. It is not final till the Board and the court have completed their functions. Thereafter the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801.[35]

The difficulty with this is that Section 801 provides for Presidential approval before the Board's decision is ever made public. It states that "all decisions thereon by the Board shall be submitted to the President *before publication.*" Although this does not say in express terms that the President is to pass upon the Board's decision before publication, that is obviously what is contemplated, and that is what is actually done, as we have shown. See pp. 25–27, *supra*. Thus, as in this case, the Board's order and opinion were first submitted to the President before publication. The President disapproved certain portions of the decision, presumably after consulting with the State Department and other interested agencies, and advised the Board as

[35] Subsequently in its opinion the Court indicated that the President could disapprove "after as before the court acts" (R. 412).

to the changes which would be required (R. 125). The Board thereupon modified its order and on May 17, 1946, resubmitted the revised order and opinion to the President for approval (R. 118, 287). The President's approval was dated May 22, 1946 (R. 287). Only then was anything made public, and what was published were the final orders and opinion with the President's approval attached.

No statement appears as to the reasons for the President's modifications, apart from a general reference to "certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility" (R. 125). Nor is any reason given for the President's concurrence in the remainder of the Board's decision. It must be assumed that he took into account the same "other matters for which the Chief Executive has special responsibility" with respect to the portions of the Board's recommendation which he approved as for the portion which he disapproved. His approval may have been motivated by reasons of his own in addition to those advanced by the Board.

Respondent contends that after all this has transpired the Board's order—though not the President's—is to be judicially reviewed. But the Board has published no order which has not first been approved by the President. At this stage the Board's order has merged into and become inseparable from the President's. For a

court to set aside or modify an order which the President has approved would in fact be to reject the President's order, though the court purported to act only in relation to the Board's reasoning and the facts in the record before the Board. If the court could not set aside the order as approved, but merely the Board's recommendation, the judicial proceeding would, of course, be futile.

If the President has disapproved the Board's recommendation, judicial review of the Board's action is even more fruitless. For, as we have seen (pp. 25–27, *supra*), the Board in such circumstances merely modifies its orders to conform to the President's instructions. Clearly there is no point to reviewing the Board's "decision," since whether the court sustains or reverses the Board, the order approved by the President will eventually be issued.

The system of judicial review conceived by the court below can function only on the hypothesis that the courts will review the Board's action prior to Presidential approval. But Section 801, with its provision for submission to the President in advance of publication, is inconsistent with this hypothesis.

Incompatibility with other provisions of Section 1006. The lower court's interpretation of Section 1006 (a) as authorizing review of orders subject to the President's approval is also inconsistent with the scheme clearly contemplated by other

portions of Section 1006. Thus, Section 1006 (d) provides that upon the filing of a petition for review and its transmittal to the Board.

> * * * the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. * * *

But with respect to orders subject to Presidential approval under Section 801 the court's jurisdiction to affirm, modify or set aside the Board's orders is clearly not exclusive. Furthermore, Section 1006 (d) contemplates that the court's jurisdiction shall be not only exclusive but conclusive (except upon the Supreme Court). But this cannot be so as to orders which the President must later approve. The same comment applies to Section 1006 (f), which provides that the judgments of the circuit courts of appeals "shall be subject *only* to review by the Supreme Court". Such language is hardly compatible with a scheme in which the order approved by the court may be subsequently reviewed by the President.

Section 1006 (e) provides:

> The findings of fact by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

The Board's findings of fact are not, however, intended to be binding upon the President when he acts under Section 801; as previously shown, the Board may be required to take action to carry into effect the decision of the President, possibly without any reliance upon its own findings. But Section 1006 (e) assumes that the court will determine whether the *Board's* findings are adequately supported—a function of no consequence when neither the Board's findings nor the evidence before it may be the basis for the order which it has actually entered after submitting the matter to the President.

We submit that for the above reasons not only would judicial review of orders covered by Section 801 be inconsistent with the general Congressional purpose to recognize the President's authority over foreign air transportation, but that it would be incompatible with the statutory provisions to which we have referred. As the Circuit Court of Appeals for the Second Circuit stated in the *Pan American* case (121 F. 2d, at 814):

> * * * It seems incredible that in enacting Section 1006 (a) Congress intended to permit a review of the action of the Board in cases where the constitutional authority of the President to negotiate with foreign nations and to proceed upon confidential and other information at his disposal and his statutory duty under Section 801 to approve or disapprove of certificates, and

even of the denial of them, would necessarily render our review futile. *United States* v. *Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255. The review of the order authorizing the issuance of the certificates is so dependent upon considerations resting in Executive discretion that it cannot be regarded as authorized by Section 1006 (a).

The Administrative Procedure Act, 60 Stat. 237 (5 U. S. C. 1001, 1009) does not provide for review of the orders here involved. Section 10 exempts from its requirements as to judicial review action which is "by law committed to agency discretion". This would clearly apply to the action of the President. Matters in the field of foreign and military policy are committed to his discretion both in the historical sense of that term and within the intent of the Civil Aeronautics Act.[36] Orders of the Board prior to the President's approval are not reviewable because they are "intermediate," not "final," agency action. See Section 10 (c).[37] Orders of the Board after

[36] The nature of the exemption in Section 10 was explained by the Senate Committee on the Judiciary as follows: "The basic exception of matters committed to agency discretion would apply even if not stated at the outset. If, for example, statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review." S. Rep. 752, 79th Cong., 1st Sess., 26. See also H. Rep. 1980, 79th Cong., 2d Sess., 41.

[37] "Every agency action made reviewable by statute and every final agency action for which there is no other ade-

the President's approval are not separable from the decisions of the President, for reasons already set forth. And the Administrative Procedure Act does not, and, of course, could not, provide for the unconstitutional type of review required by the decision below, which subordinates the court's order to the President's ultimate control.[28]

II

IF SECTION 1006 (A) OF THE CIVIL AERONAUTICS ACT IS CONSTRUED AS PROVIDING JUDICIAL REVIEW FOR ORDERS OF THE CIVIL AERONAUTICS BOARD WHICH ARE SUBJECT TO THE APPROVAL OF THE PRESIDENT, SUCH REVIEW IS INHERENTLY LIMITED TO DETERMINATION OF WHETHER SUCH ORDERS ARE BEYOND THE AUTHORITY CONFERRED BY THE ACT AND WERE ISSUED AFTER COMPLIANCE WITH THE STATUTORY PROCEDURES. UNDER THESE PRINCIPLES NO GROUND FOR REVERSAL OF THE BOARD'S ORDER IS SHOWN

A. REVIEW WOULD NOT EXTEND TO THE EXERCISE OF THE PRESIDENT'S DISCRETIONARY AUTHORITY

It has been shown in Point I that a serious constitutional barrier is encountered if Section 1006 is construed, as the court below construed it,

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quate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action * * *"

[28] Since the petition for review was filed on September 6, 1946, while the Administrative Procedure Act generally became effective on September 11, 1946, it is also possible that Section 10 of that Act should be construed as inapplicable to judicial review proceedings instituted prior to that date. See Section 12 of the Administrative Procedure Act, and cf. *United States* v. *Rusicka*, 329 U. S. 287.

to provide for judicial review of the Board's action prior to the approval of the President required by Section 801. We now point out that if Section 1006 is construed to provide for review by the circuit court of appeals of the Board's order *as* approved by the President, such review is subject to limitations inherent in the scheme of the Civil Aeronautics Act and in the relationship between courts and executive agencies.

The President's power over the issuance or denial of certificates authorizing an air carrier to engage in overseas or foreign air transportation is, as we have seen, one of plenary discretion. Section 801 simply provides that the issuance or denial, *inter alia, of* such certificates "shall be subject to the approval of the President." The Act imposes no restrictions upon the discretion to be exercised by the President after the Board has completed its functions. Rather the Act and its history breathe intention that the President shall exercise, with respect to the Board's proposed order, an unrestrained supervision which will correlate the development of foreign air transportation with those other elements of diplomatic and military policy which are his peculiar responsibility, and which can seldom be revealed in a judicially reviewable record. This discretionary power of the President is unreviewable—there is nothing to review. Since the President in exercising his discretion is not required to limit

himself to the evidence before the Board, there can be no basis upon which a reviewing court may determine whether his decision is supported by evidence.

This means that the judicial function does not extend to review of the determination "that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder, and that such transportation is required by the public convenience and necessity." For the determination as to whether an applicant is thus qualified falls within the area of discretion in which the President's decision may not be reviewed. The Board's original findings and recommendations become inseparably merged with the President's action pursuant to Section 801. The courts cannot tell whether a particular finding by the Board had any bearing on the result reached by the joint President-Board action, or, stated differently, whether the President's exercise of discretion would be changed if the Board's findings are modified or set aside. Under these circumstances, it is incompatible with the judicial function for a court to review the Board's finding as to such matters as the public convenience and necessity and the fitness, willingness, and ability of applicants for certificates authorizing overseas or foreign air transportation.

While the exercise of the President's discretionary power is not subject to judicial review, there remains the question whether any other elements of the joint President-Board action are properly reviewable by the courts.

In Section 401 of the Civil Aeronautics Act, Congress has imposed various conditions precedent to the issuance of cerificates of public convenience and necessity. Public notice of the filing of an application for such a certificate must be given by the Board, and the application may be determined only after a public hearing. Section 401 (c). Also, Section 401 (f) contains affirmative and negative requirements as to the terms and conditions to be contained in any certificate which may be issued under that section. It requires, *inter alia*, that American carrier certificates for foreign air transportation must permit the handling of foreign mail. Again the certificates may not restrict the right of the carrier "to add to or change schedules". If Section 1006 (a) is construed as evidencing a Congressional purpose to provide for review, so far as practicable, of joint President-Board orders relating to certificates for overseas or foreign air transportation, then these are matters which are capable of judicial scrutiny to ascertain whether there has been compliance with the statutory requirements.

To summarize our views: the President's discretionary powers under Section 801 are not

reviewable. Questions as to the adequacy of evidence to support the Board's findings and conclusions do not present reviewable issues. The Board's compliance with such statutory requirements as notice and hearing may be reviewable, together with outright questions of law such as would be involved in the Board's failure to comply with the requirements of Section 401 (f).

B. SUCH A PATTERN OF LIMITED REVIEW IS IDENTICAL WITH THAT EVOLVED BY THE COURTS IN DEALING WITH A SIMILAR SITUATION UNDER THE TARIFF LAWS

Our analysis of the limited scope of judicial review in cases such as this, assuming that Section 1006 (a) is construed to require any judicial review of Board orders as approved by the President, finds remarkable confirmation in the judicial review which has been evolved with respect to Presidential proclamations under the flexible tariff provisions of the tariff acts.

Under Section 315 of the Tariff Act of 1922 (Act of September 21, 1922, c. 356, Title III, Sec. 315, 42 Stat. 858, 941), the President was authorized by proclamation to increase or decrease the rates of duty specified in that Act if he found upon investigation that such action was necessary to equalize differences in costs of production as between the United States and other countries. It was further provided that, "Investigations to assist the President in ascertaining differences in costs of production under this

section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard."

Section 336 of the Tariff Act of 1930, Act of June 17, 1930, c. 497, 46 Stat. 590, 701, 19 U. S. C. 1336, which superseded Section 315 of the earlier Act, provides a similar pattern. After an investigation in which the Tariff Commission "shall hold hearings and give reasonable public notice thereof, and shall afford reasonable opportunity for parties interested to be present, to produce evidence, and to be heard at such hearings", the Commission reports to the President the results of the investigation and its findings with respect to such differences in costs of production, and specifies in its report such increases or decreases in the statutory rates of duty as it finds necessary to equalize such differences. Thereafter, the President may approve by proclamation the changes in duty specified in the Commission's report "if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production."

Both the Tariff Acts of 1922 and 1930 thus pro-

vided for an investigation by the Tariff Commission, to include notice and public hearing and receipt of evidence; thereafter, the President acts. Neither Act provided for direct review of the President's proclamations, but under the statutory protest procedure importers sought to challenge in the Customs Court and the Court of Customs and Patent Appeals the validity of increases in duty resulting from such proclamations. As a result of such cases, it has been stated that an investigation by the Tariff Commission is a condition precedent to action by the President. *Hampton & Co.* v. *United States,* 276 U. S. 394, 405; *William A. Foster & Co. Inc.* v. *United States,* 20 C. C. P. A. (Customs) 15; *United States* v. *Fox River Butter Co.,* 20 C. C. P. A. (Customs) 38, certiorari denied, 287 U. S. 628. Specifically, it has been held that where the public notice given by the Tariff Commission relates to one commodity while the President's proclamation changes the duty on a commodity not mentioned in the notice, there has been such a failure to comply with the statutory procedure that the increase in the duty is void. *Carl Zeiss, Inc.* v. *United States,* 76 F. 2d 412 (C. C. P. A. Customs). And it has been assumed that if the President exceeded his authority under the statute, as by increasing or decreasing rates of duty by more than 50 percent or by transferring commodities from the free list to the duty list, such

action could be invalidated in a proper proceeding. *William A. Foster & Co. Inc.* v. *United States, supra,* at pp. 23–25.

However, in *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, and in *United States* v. *Bush & Co.,* 310 U. S. 371, this Court held flatly that neither the findings of the Tariff Commission nor the final action of the President were reviewable on the substantive merits, i. e., whether such findings or such action was justified by the evidence adduced before the Commission. In the *Norwegian Nitrogen Products* case, involving Section 315 of the Tariff Act of 1922, this Court put it as follows (at p. 318):

> * * * What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed.

In the *Bush* case, arising under Section 336 of the Tariff Act of 1930, this Court, in refusing to review the correctness of the President's exercise of discretion, characterized the situation in these terms (at pp. 379–380):

The powers which Congress has entrusted to the President under the Act of 1930 do not essentially differ in kind from those which have been granted him under the tariff acts for well over a century. See *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 293, 308 *et seq.,* for a review of the statutes. Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. * * * And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. *Martin* v. *Mott,* 12 Wheat. 19; *Monongahela Bridge*

> *Co.* v. *United States,* 216 U. S. 177; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1. As stated by Mr. Justice Story in *Martin* v. *Mott, supra,* pp. 31–32: "Wherever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

Since then the United States Customs Court, specifically concerned with such tariff matters, has recognized and held that the decision of this Court in the *Bush* case prohibits a review of the proceeding before the Tariff Commission for the purpose of ascertaining whether Presidential action is supported by substantial evidence. *Mitsui & Co.* v. *United States,* 6 Cust. Rep. 406 (C. D. 505, 1941); *T. M. Duche & Sons* v. *United States,* 13 Cust. Rep. 26 (C. D. 863, 1944); *T. M. Duche & Sons* v. *United States,* 82 Treas. Dec. No. 5, p. 15 (C. D. 1040, January 15, 1947), appeal pending (C. C. A.). In the language of the Customs Court in the latter case (82 Treas. Dec. No. 5, at page 17):

> We are of the opinion that this court is not empowered under the statute to examine the report of the Tariff Commission and the evidence before it in order to determine whether or not the findings of

the Commission were based upon substantial evidence. The well-settled principle of law which may be appropriately applied here limits judicial inquiry to an examination of the proceedings of the Tariff Commission to ascertain whether the jurisdictional requirements of the statute, section 336 of the Tariff Act of 1930, have been complied with. To go further, however, and explore the reasons which actuate the President in the exercise of his judgment in making his proclamation or to weigh the evidence before the Tariff Commission would transcend the province of the courts in cases of this nature.

In our opinion, whether or not we may judicially inquire into the proceedings of the Tariff Commission, weigh the evidence presented before that body to determine whether it would substantiate the report made to the President, or question the reasons underlying the Presidential proclamation, are questions fully covered by the Supreme Court in the *Bush* case, *supra*.[39]

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[39] In the cited cases, the Customs Court squarely recognizes that the rule applied in *David L. Moss, Inc.* v. *United States*, 103 F. 2d 395 (C. C. P. A.), which is heavily relied upon by the respondent below, was overruled by this Court in *United States* v. *Bush & Co.*, *supra*. See particularly *T. M. Duche & Sons* v. *United States*, 13 Customs Rep. 26, 30, where it is said:

> * * * The issue herein relates to the legality of a finding of fact by the President upon a subject which is strictly within his discretionary powers.
>
> The testimony taken before the Tariff Commission and

The analogy is persuasive. The Tariff Commission, after notice and hearing, reports to the President the specific changes in rates of duty which it believes are necessary to equalize differences in cost of production. Thereafter, the President may by proclamation approve the changes proposed by the Commission (he cannot fix any others) *"if in his judgment"* such changes are *"shown by such investigation of the commission* to be necessary to equalize such differences in costs of production". (Italics supplied.) It is to be noted also that under the Tariff Act of 1930 the President is directed to exercise his discretion in the light of the same standard as is prescribed for the Commission, i. e., equalizing differences in costs of production. So, too, the Civil Aeronautics Board, after notice and hearing, submits to the President its proposed order disposing of applications for certificates to engage in foreign air transportation. Under the Civil Aeronautics Act, however, the President's discretion is far broader. He is

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the report of that body on the case, were admitted in evidence inasmuch as it had been held by the appellate court, in *David L. Moss Co., Inc.* v. *United States*, *supra*, that such evidence was the proper subject of review by the court. However, the trial occurred prior to the decision of the United States Supreme Court in the case of *United States* v. *George S. Bush & Co., Inc.*, *supra*, in which case it was held that the court could not review such documents. It is evident from the decision of the United States Supreme Court, above referred to, that the exhibits should not have been received in evidence for the purpose for which they were introduced.

expected to exercise his discretionary power in relation to diplomatic and military considerations which are completely alien to the scope of the Board's precedent hearing and findings. Since under the Tariff Act, where the President is limited to consideration of matters shown by the Commission's investigation, neither the findings of the Commission nor the action of the President are reviewable to determine whether such findings or such actions are supported by substantial evidence, the same result follows, *a fortiori,* under the Civil Aeronautics Act where the President is not so limited.

C. THE PETITION FOR REVIEW BELOW IS INSUFFICIENT AS A MATTER OF LAW TO INVOKE THE JURISDICTION OF THE COURT

We have shown that if the Civil Aeronautics Act is construed to require judicial review of Board orders subject to approval of the President after such approval, review must be limited to questions of whether the President has acted within the authority conferred by the Act and of whether there has been compliance with the statutory procedures. The petition for review (R. 1-9) shows on its face that, with at most two exceptions, every objection of the respondent (petitioner below) is directed at the correctness of the Board's findings of fact on such issues as the fitness, willingness and ability of C & S and at the alleged inadequacy of the evidence underlying the Board's

findings (R. 6–8). But, as pointed out, *supra*, these findings have become so merged with the President's discretionary action pursuant to Section 801 that they are incapable of review. Respondent's objections based upon the Board's denial of its motion to reopen the proceeding and to receive further evidence are merely another attack upon the sufficiency of the evidence supporting the Board's findings and are similarly unreviewable.

The petition does purport to raise a question of law, i. e., whether the Board was in error as a matter of law in "holding that a surface carrier upon an application of Section 401 of the Act must meet the tests of Section 408 (b) of the Act" (R. 7). However, this represents no justiciable issue under any concept of reviewability because the Board stated flatly in its opinion that it had not applied Section 408 (b) to the surface carrier applicants in this case, but was merely stating its position "for the guidance of future applicants" (R. 202).[40] For the Board declared (R. 211):

> Since we have concluded that the comparative public convenience and necessity would be best served by selecting Chicago and

[40] The Board's opinion states on this point (R. 202):

"Although we do not find it necessary to decide the question whether the several steamship applicants for the New York-San Juan route met the requirements of the second proviso of section 408, we think it advisable for

Southern to provide service over this route, it is unnecessary to determine whether Waterman has met the tests of the second proviso of section 408.

The petition also asserted that the Board "failed to make an appropriate finding that C & S is fit, willing and able, as required by Section 401 (d) of the Act" (R. 6). To the contrary, the Board specifically stated that "we find that * * * each [carrier to whom it proposed to issue certificates] is fit, willing, and able properly to perform the air transportation herein authorized, respectively, and to conform to the provisions of the Act of the rules, regulations, and requirements of the Board thereunder" (R. 230). If such a finding is a reviewable jurisdictional requirement, it has been made.

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the guidance of future applicants to express our opinion on the question whether the special restrictive conditions of section 408 (b) of the Civil Aeronautics Act covering the acquisition of air carriers by surface carrier are contained within the statutory standards of public convenience and necessity appearing in section 401 and therefore whether a surface carrier in applying for a certificate is under a *legal* restriction to which other applicants are not subject."

This question was subsequently reconsidered by the Board and its position modified in *Petition of American President Lines, Ltd.*, Docket No. 2411, decided March 19, 1947. It is to be noted that neither in the Latin American case nor in any other new route proceedings has the Board denied an application on the ground that a surface carrier applicant fails to meet the restrictive requirements of Section 408 (b).

Thus, apart from the two points shown to be baseless on the face of the Board's opinion, there were presented to the reviewing court in this case only issues relating to the sufficiency of the Board's findings of fact. Under well-established principles, these issues, upon approval by the President of the Board's recommendation, are unreviewable. Accordingly, there is nothing for the court below to review and it should be directed to dismiss the petition.[11]

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[11] While the petition for review also refers to the Board's order of July 12, 1946 (R. 328) denying respondent's petition for rehearing and reconsideration (R. 290), that petition for rehearing and reconsideration represents merely the petitioner's concern to protect his avenue to judicial review by exhausting all available administrative remedies. See *Braniff Airways, Inc.* v. *C. A. B.*, 147 F. 2d 152 (App. D. C.); *Saginaw Broadcasting Co.* v. *F. C. C.*, 96 F. 2d 554 (App. D. C.). In any event, our argument as to lack of reviewability of the Board's substantive orders clearly covers applications for rehearing and reconsideration. See also *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 514–519; *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 534–535.

CONCLUSION

For the above reasons, it is respectfully submitted that the order of the court below refusing to dismiss the petition for review should be reversed.

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NOVEMBER 1947.

APPENDIX

PERTINENT PROVISIONS OF THE CIVIL AERONAUTICS ACT OF 1938, AS AMENDED[1]

SEC. 1. As used in this Act, unless the context otherwise requires—

* * * * * *

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation * * *

* * * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * * *

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in foreign air transportation.

* * * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common car-

[1] Act of June 23, 1938, c. 601, 52 Stat. 977; Reorg. Plan No. IV, § 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235 (49 U. S. C. 401 *et seq.*).

rier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession (except the Philippine Islands) of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * * *

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation * * *.

(b) Application for a certificate shall be made in writing to the Board and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible.

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

* * * * * *

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal

and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. * * *

* * * * *

SEC. 402 (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage * * *.

* * * * *

SEC. 408 (b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be ful-

filled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

* * * * *

SEC. 801. The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section

402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. * * *.

* * * * * *

SEC. 802. The Secretary of State shall advise the Board of, and consult with the Board concerning, the negotiation of any agreements with foreign governments for the establishment or development of air navigation, including air routes and services.

* * * * * *

SEC. 1006. (a) Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board by the clerk of the court; and the Board shall thereupon certify and file in the court a transcript of the record, if any, upon which the order complained of was entered.

(d) Upon transmittal of the petition to the Board, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board. Upon good cause shown, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided,* That no interlocutory relief may be granted except upon at least five days' notice to the Board.

(e) The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so.

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code.

* * * * * *

SEC. 1102. In exercising and performing its powers and duties under this Act, the Board shall do so consistently with any obligation assumed by

the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, shall take into consideration any applicable laws and requirements of foreign countries and shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided,* That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest.

U. S. GOVERNMENT PRINTING OFFICE: 1947

SUPREME COURT OF THE UNITED STATES

NOS. 78 AND 88.—OCTOBER TERM, 1947.

Chicago and Southern Air Lines, Inc., Petitioner, 78 *v.* Waterman Steamship Corporation. Civil Aeronautics Board, Petitioner, 88 *v.* Waterman Steamship Corporation.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 9, 1948.]

MR. JUSTICE JACKSON delivered the opinion of the Court.

The question of law which brings this controversy here is whether § 1006 of the Civil Aeronautics Act, 49 U. S. C. 646, authorizing judicial review of described orders of the Civil Aeronautics Board, includes those which grant or deny applications by citizen carriers to engage in overseas and foreign air transportation which are subject to approval by the President under § 801 of the Act. 49 U. S. C. 601.

By proceedings not challenged as to regularity, the Board, with express approval of the President, issued an order which denied Waterman Steamship Corporation a certificate of convenience and necessity for an air route and granted one to Chicago and Southern Air Lines, a rival applicant. Routes sought by both carrier interests involved overseas air transportation, § 1 (21) (b), between Continental United States and Caribbean possessions and also foreign air transportation, § 1 (21) (c), between the United States and foreign countries. Waterman filed a petition for review under § 1006 of the Act with the Circuit Court of Appeals for the Fifth Circuit. Chicago and Southern intervened. Both the latter and the

Board moved to dismiss, the grounds pertinent here being that because the order required and had approval of the President, under § 801 of the Act, it was not reviewable. The Court of Appeals disclaimed any power to question or review either the President's approval or his disapproval, but it regarded any Board order as incomplete until court review, after which "the completed action must be approved by the President as to citizen air carriers in cases under Section 801." 159 F. 2d 828. Accordingly, it refused to dismiss the petition and asserted jurisdiction. Its decision conflicts with one by the Court of Appeals for the Second Circuit. *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 121 F. 2d 810. We granted certiorari both to the Chicago and Southern Air Lines, Inc. (No. 78) and to the Board (No. 88) to resolve the conflict.

Congress has set up a comprehensive scheme for regulation of common carriers by air. Many statutory provisions apply indifferently whether the carrier is a foreign air carrier or a citizen air carrier, and whether the carriage involved is "interstate air commerce," "overseas air commerce" or "foreign air commerce," each being appropriately defined. 49 U. S. C. 401 (20). All air carriers by similar procedures must obtain from the Board certificates of convenience and necessity by showing a public interest in establishment of the route and the applicant's ability to serve it. But when a foreign carrier asks for any permit, or a citizen carrier applies for a certificate to engage in any overseas or foreign air transportation, a copy of the application must be transmitted to the President before hearing; and any decision, either to grant or to deny, must be submitted to the President before publication and is unconditionally subject to the President's approval. Also the statute subjects to judicial review "any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the

President as provided in Section 801 of this Act." It grants no express exemption to an order such as the one before us, which concerns a citizen carrier but which must have Presidential approval because it involves overseas and foreign air transportation. The question is whether an exemption is to be implied.

This Court long has held that statutes which employ broad terms to confer power of judicial review are not always to be read literally. Where Congress has authorized review of "any order" or used other equally inclusive terms, courts have declined the opportunity to magnify their jurisdiction, by self-denying constructions which do not subject to judicial control orders which, from their nature, from the context of the Act, or from the relation of judicial power to the subject-matter, are inappropriate for review. Examples are set forth by Chief Justice Hughes in *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375, 384. *Cf. Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 130.

The Waterman Steamship Corporation urges that review of the problems involved in establishing foreign air routes are of no more international delicacy or strategic importance than those involved in routes for water carriage. It says, "It is submitted that there is no basic difference between the conduct of the foreign commerce of the United States by air or by sea." From this premise it reasons that we should interpret this statute to follow the pattern of judicial review adopted in relation to orders affecting foreign commerce by rail, *Lewis Simas Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654; *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, or communications by wire, *United States* v. *Western Union Telegraph Co.*, 272 F. 893, or by radio, *Mackay Radio & Telegraph Co.* v. *Federal Communications Commission*, 97 F. 2d 641; and it likens the subject-matter of aeronautics legislation to that of Title VI of the Merchant

Marine Act of 1936, 46 U. S. C. § 1171, and the function of the Aeronautics Board in respect to overseas and foreign air transportation to that of the Maritime Commission to such commerce when water-borne.

We find no indication that the Congress either entertained or fostered the narrow concept that air-borne commerce is a mere outgrowth or overgrowth of surface-bound transport. Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. Ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society. A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past. While transport by land and by sea began before any existing government was established and their respective customs and practices matured into bodies of carrier law independently of legislation, air transport burst suddenly upon modern governments, offering new advantages, demanding new rights and carrying new threats which society could meet with timely adjustments only by prompt invocation of legislative authority. However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimen-

sions should be judicially circumscribed with analogies taken over from two-dimensional transit.

The "public interest" that enters into awards of routes for aerial carriers, who in effect obtain also a sponsorship by our government in foreign ventures, is not confined to adequacy of transportation service, as we have held when that term is applied to railroads. *Texas* v. *United States*, 292 U. S. 522, 531. That aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations, is a fact of common knowledge. Congressional hearings and debates extending over several sessions and departmental studies of many years show that the legislative and administrative processes have proceeded in full recognition of these facts.

In the regulation of commercial aeronautics, the statute confers on the Board many powers conventional in other carrier regulation under the Congressional commerce power. They are exercised through usual procedures and apply settled standards with only customary administrative finality. Congress evidently thought of the administrative function in terms used by this Court of another of its agencies in exercising interstate commerce power: "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and in the contemplation of the statute, must be free from executive control." *Humphrey's Executor* v. *United States*, 295 U. S. 602, 628. Those orders which do not require Presidential approval are subject to judicial review to assure application of the standards Congress has laid down.

But when a foreign carrier seeks to engage in public carriage over the territory or waters of this country, or any carrier seeks the sponsorship of this Government to engage in overseas or foreign air transportation, Congress

has completely inverted the usual administrative process. Instead of acting independently of executive control, the agency is then subordinated to it. Instead of its order serving as a final disposition of the application, its force is exhausted when it serves as a recommendation to the President. Instead of being handed down to the parties as the conclusion of the administrative process, it must be submitted to the President, before publication even can take place. Nor is the President's control of the ultimate decision a mere right of veto. It is not alone issuance of such authorizations that are subject to his approval, but denial, transfer, amendment, cancellation or suspension, as well. And likewise subject to his approval are the terms, conditions and limitations of the order. 49 U. S. C. § 601. Thus, Presidential control is not limited to a negative but is a positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies.

Congress may of course delegate very large grants of its power over foreign commerce to the President. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *United States* v. *Bush*, 310 U. S. 371. The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs. For present purposes, the order draws vitality from either or both sources. Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies.

These considerations seem controlling on the question whether the Board's action on overseas and foreign air transportation applications by citizens are subject to revision or overthrow by the courts.

It may be conceded that a literal reading of § 1006 subjects this order to re-examination by the courts.

It also appears that the language was deliberately employed by Congress, although nothing indicates that Congress foresaw or intended the consequences ascribed to it by the decision of the Court below. The letter of the text might with equal consistency be construed to require any one of three things: first, judicial review of a decision by the President; second, judicial review of a Board order before it acquires finality through Presidential action, the court's decision on review being a binding limitation on the President's action; third, a judicial review before action by the President, the latter being at liberty wholly to disregard the court's judgment. We think none of these results is required by usual canons of construction.

In this case, submission of the Board's decision was made to the President, who disapproved certain portions of it and advised the Board of the changes which he required. The Board complied and submitted a revised order and opinion which the President approved. Only then were they made public, and that which was made public and which is before us is only the final order and opinion containing the President's amendments and bearing his approval. Only at that stage was review sought, and only then could it be pursued, for then only was the decision consummated, announced and available to the parties.

While the changes made at direction of the President may be identified, the reasons therefor are not disclosed beyond the statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion.

The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for

foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman* v. *Miller*, 307 U. S. 433, 454; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302. We therefore agree that whatever of this order emanates from the President is not susceptible of review by the Judicial Department.

The court below thought that this disability could be overcome by regarding the Board as a regulatory agent of Congress to pass on such matters as the fitness, willingness and ability of the applicant, and that the Board's own determination of these matters is subject to review. The court, speaking of the Board's action, said: "It is not final till the Board and the court have completed their functions. Thereafter, the completed action must be approved by the President as to citizen air carriers in cases under Sec. 801." The legal incongruity of interposing judicial review between the action by the Board and that by the President are as great as the practical disadvan-

tages. The latter arise chiefly from the inevitable delay and obstruction in the midst of the administrative proceedings. The former arises from the fact that until the President acts there is no final administrative determination to review. The statute would hardly have forbidden publication before submission if it had contemplated interposition of the courts at this intermediate stage. Nor could it have expected the courts to stay the President's hand after submission while they deliberate on the inchoate determination. The difficulty is manifest in this case. Review could not be sought until the order was made available, and at that time it had ceased to be merely the Board's tentative decision and had become one finalized by Presidential discretion.

Until the decision of the Board has Presidential approval, it grants no privilege and denies no right. It can give nothing and can take nothing away from the applicant or a competitor. It may be a step, which if erroneous will mature into a prejudicial result, as an order fixing valuations in a rate proceeding may foreshow and compel a prejudicial rate order. But administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process. *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299; *United States* v. *Illinois Central R. Co.*, 244 U. S. 82; *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 131. The dilemma faced by those who demand judicial review of the Board's order is that, before Presidential approval, it is not a final determination even of the Board's ultimate action, and after Presidential approval, the whole order, both in what is approved without change, as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion.

The court below considered that after it reviewed the Board's order, its judgment would be submitted to the President, that his power to disapprove would apply after as well as before the court acts, and hence that there would be no chance of a deadlock and no conflict of function. But if the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government.

To revise or review an administrative decision, which has only the force of a recommendation to the President, would be to render an advisory opinion in its most obnoxious form—advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control. This Court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive. It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40; *Gordon* v. *United States*, 117 U. S. 697; *In re Sanborn*, 148 U. S. 222; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423; *Muskrat* v. *United States*, 219 U. S. 346; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386.

We conclude that orders of the Board as to certificate for overseas or foreign air transportation are not mature and are therefore not susceptible to judicial review at any time before they are finalized by Presidential approval.

After such approval has been given, the final orders embody Presidential discretion as to political matters beyond the competence of the courts to adjudicate. This makes it unnecessary to examine the other questions raised. The petition of the Waterman Steamship Corp. should be dismissed.

Judgment reversed.

SUPREME COURT OF THE UNITED STATES

Nos. 78 and 88.—October Term, 1947.

Chicago and Southern Air Lines, Inc., Petitioner, 78 v. Waterman Steamship Corporation. Civil Aeronautics Board, Petitioner, 88 v. Waterman Steamship Corporation.	On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 9, 1948.]

Mr. Justice Douglas, with whom Mr. Justice Black, Mr. Justice Reed and Mr. Justice Rutledge concur, dissenting.

Congress has specifically provided for judicial review of orders of the Civil Aeronautics Board of the kind involved in this case. That review can be had without intruding on the exclusive domain of the Chief Executive. And by granting it we give effect to the interests of both the Congress and the Chief Executive in this field.

The Commerce Clause of the Constitution grants Congress control over interstate and foreign commerce. Art. I, § 8. The present Act is an exercise of that power. Congress created the Board and defined its functions. It specified the standards which the Board is to apply in granting certificates for overseas and foreign air transportation.[1] It expressly made subject to judicial review orders of the Board granting or denying certificates to citizens and withheld judicial review where the applicants are not citizens.[2] If this were all, there would be no question.

[1] See §§ 401, 408 (b), 52 Stat. 987, 1001, 49 U. S. C. §§ 481, 488.

[2] Section 1006 (a) provides in part: "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the

But Congress did not leave the matter entirely to the Board. Recognizing the important role the President plays in military and foreign affairs, it made him a participant in the process. Applications for certificates of the type involved here are transmitted to him before hearing, all decisions on the applications are submitted to him before their publication, and the orders are "subject to" his approval.[3] Since his decisions in these matters are of a character which involve an exercise of his discretion in foreign affairs or military matters, I do not think Congress intended them to be subject to judicial review.

But review of the President's action does not result from reading the statute in the way it is written. Congress made reviewable by the courts only orders "issued by the Board under this Act."[4] Those orders can be reviewed without reference to any conduct of the President, for that part of the orders which is the work of the Board is plainly identifiable.[5] The President is presum-

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circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order." 52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. § 646 (a).

Section 401 (a) requires every air carrier to have a certificate before engaging in air transportation. 52 Stat. 987, 49 U. S. C. § 481 (a). There is the same requirement in case of a foreign air carrier. § 402 (a), 52 Stat. 991, 49 U. S. C. § 482 (a). An air carrier is defined as a citizen [§ 1 (2), 52 Stat. 977, 49 U. S. C. § 401 (2)], and a foreign air carrier as any person not a citizen, and engaged in foreign air transportation. § 1 (19), 52 Stat. 978, 49 U. S. C. § 401 (19).

[3] § 801. 52 Stat. 1014, 49 U. S. C. § 601.

[4] § 1006 (a), *supra*, note 2.

[5] The Board had consolidated for hearing 29 applications for certificates to engage in air transportation which were filed by 15 applicants. The President's partial disapproval of the proposed disposition of these applications did not relate to the applications involved in this case. As to them, the action of the Board stands unaltered.

ably concerned only with the impact of the order on foreign relations or military matters. To the extent that he disapproves action taken by the Board, his action controls. But where that is not done, the Board's order has an existence independent of Presidential approval, tracing to Congress' power to regulate commerce. Approval by the President under this statutory scheme has relevance for purposes of review only as indicating *when* the action of the Board is reviewable. When the Board has finished with the order, the administrative function is ended. When the order fixes rights, on clearance by the President, it becomes reviewable. But the action of the President does not broaden the review. Review is restricted to the action of the Board and the Board alone.

The statute, as I construe it, contemplates that certificates issued will rest on orders of the Board which satisfy the standards prescribed by Congress. Presidential approval cannot make valid invalid orders of the Board. His approval supplements rather than supersedes Board action. Only when the Board has acted within the limits of its authority has the basis been laid for issuance of certificates. The requirement that a valid Board order underlie each certificate thus protects the President as well as the litigants and the public interest against unlawful Board action.

The importance of the problem is evidenced by the character of cases controlled by this decision. The present ruling is not limited to cases granting or denying certificates for air transportation to and from foreign countries. It also denies power to review orders governing air transportation between two points in Alaska, between two points in Hawaii, between Seattle and Juneau, between New Orleans and San Juan.* All of those are now beyond judicial review. And so they should be so far as conduct

* By § 801 the approval of the President extends to orders "authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or posses-

of the President is concerned. But Congress has commanded otherwise as to action by the Board. The Board can act in a lawless way. With that in mind, Congress sought to preserve the integrity of the administrative process by making judicial review a check on Board action. That was the aim of Congress, now defeated by a legalism which in my view does not square with reality.

In this petition for review, the respondent charged that the Board had no substantial evidence to support its findings that Chicago and Southern Air Lines was fit, willing and able to perform its obligations under the certificate; and it charged that when a change of conditions as to Chicago and Southern Air Lines' ability to perform was called to the attention of the Board, the Board refused to reopen the case. I do not know whether there is merit in those contentions. But no matter how substantial and important the questions, they are now beyond judicial review. Today a litigant tenders questions concerning the arbitrary character of the Board's ruling. Tomorrow those questions may relate to the right to notice, adequacy of hearings, or the lack of procedural due process of law. But no matter how extreme the action of the Board, the courts are powerless to correct it under today's decision. Thus the purpose of Congress is frustrated.

Judicial review would assure the President, the litigants and the public that the Board had acted within the limits of its authority. It would carry out the aim of Congress to guard against administrative action which exceeds the statutory bounds. It would give effect to the interests of both Congress and the President in this field.

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sion." 52 Stat. 1014, 49 U. S. C. § 601. Section 1 (21) includes in overseas air transportation commerce between a place in the continental United States and a place in a Territory or possession of the United States, or between a place in a Territory or possession of the United States and a place in any other Territory or possession. 52 Stat. 979, 49 U. S. C. § 401 (21).